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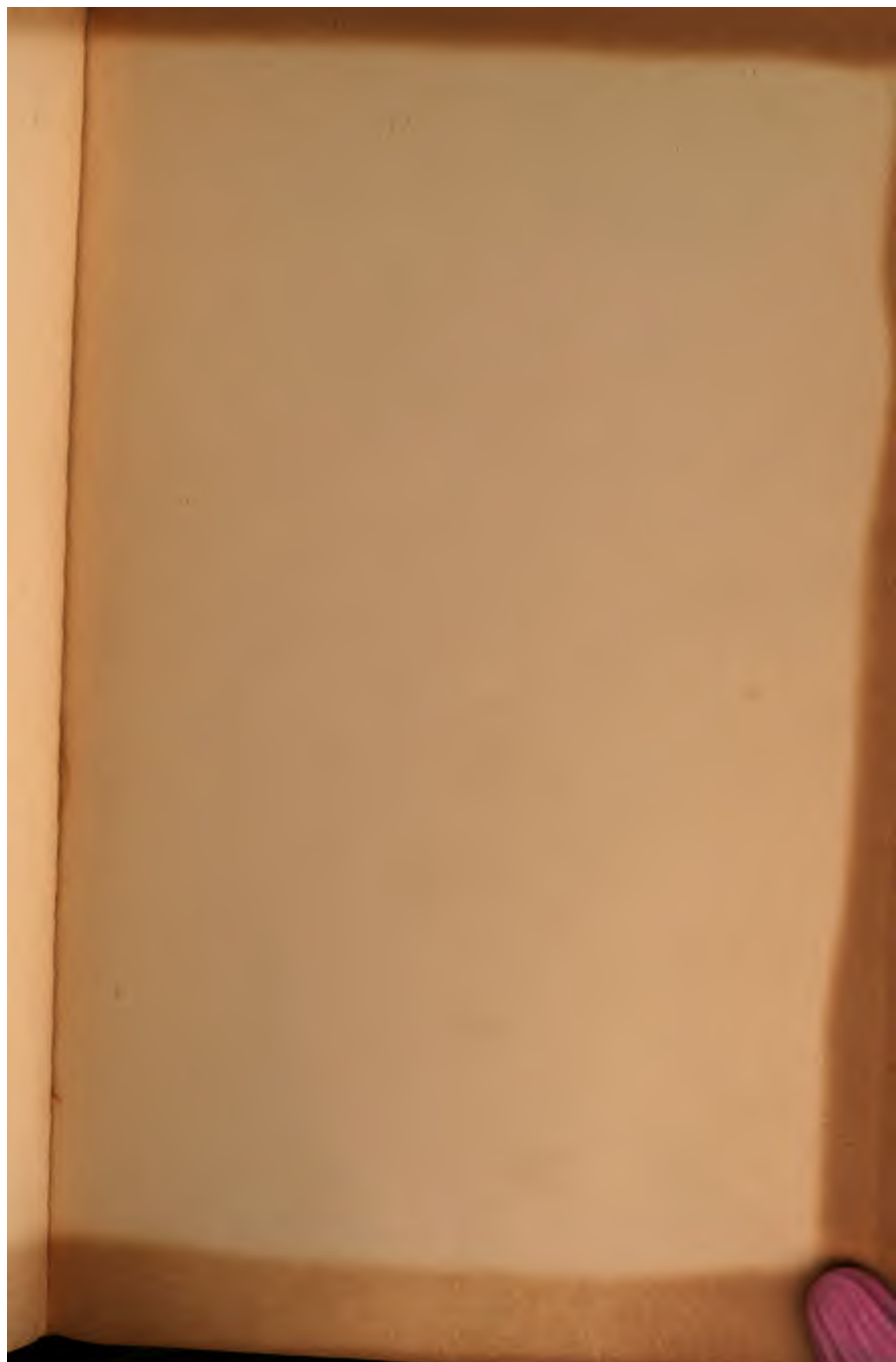
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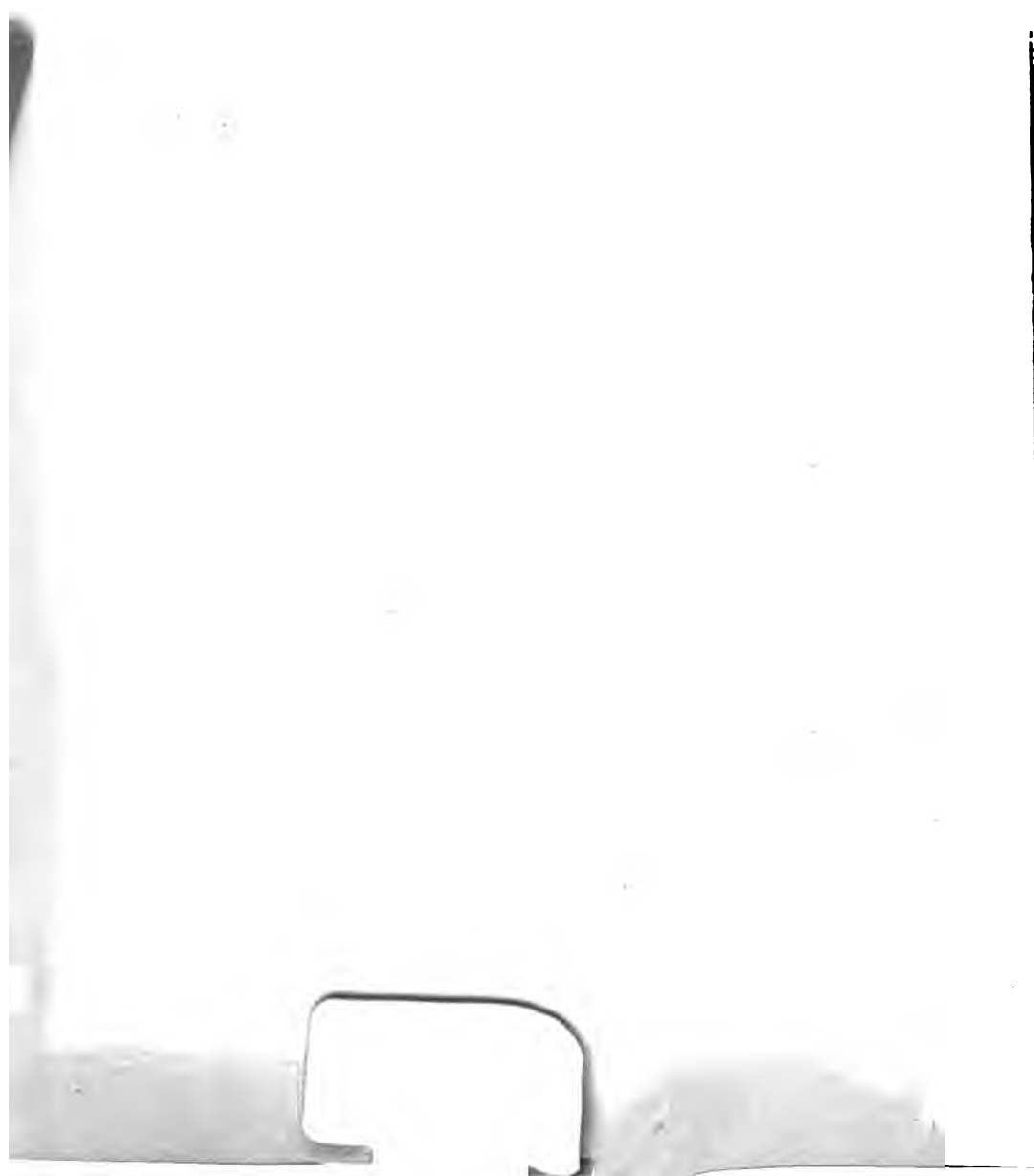
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A TREATISE

ON THE LAW OF

INDIRECT AND COLLATERAL
EVIDENCE

BY JOHN H. GILLET
JUDGE THIRTY-FIRST JUDICIAL CIRCUIT OF INDIANA

INDIANAPOLIS AND KANSAS CITY
THE BOWEN-MERRILL COMPANY
1897

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PREFACE.

A NAVIGATOR upon the open sea of the common law should steer by compass. It is not only his privilege but his duty to state the law according to principle. The cases are his servants to illustrate and enforce the text, and he owes to them no duty except to make a faithful and unbiased exhibit of them as they are. It is not, however, an iconoclastic mind which searches for the true vein of law, for, while reason is the virile and juvenescent factor of the common law, yet it is the apotheosis of that noble science that Authority, illumined by the wisdom of the ages, rarely leaves the path of Reason. In practical effect, a writer upon the subject of evidence, least trammelled, as it is, by the doctrine of *stare decisis*, finds that the composite authority of the past is a faithful portrayal of what the dictates of reason show that the law is.

“Out of the old fieldes
Cometh al this new corne.”

The author confesses that it has been his purpose in writing the following pages to state the law. It is for an intelligent and discriminating profession to determine to what extent the personal equation has caused the result to fall short of the attempt.

As custom justifies the expectation that there will be at least an outline of the character of a book presented in the preface, it may be said of this undertaking, that the subject of declara-

tory evidence is discussed in all of its aspects ; that the chapter on collateral evidence is a contribution to a subject which has never received systematic discussion, and that it has been the author's endeavor, by a consideration and an analysis of the authorities, to put the topic of *res gestæ*, and the allied topic of declarations denoting subjective conditions, upon a scientific basis. The voluntary limitations upon this work, as a work on evidence, lie in the exclusion of the subjects of presumptions, primary and secondary evidence, evidence excluded on grounds of public policy, and evidence applicable to particular actions. Even these topics, however, receive considerable of incidental treatment.

The work is one of original investigation. This is a consideration of paramount importance.

The loftiest ambition of a lawyer is to make a permanent impress upon his profession by contributing something to its adornment. The author's hopes will not carry him upon such an ambitious flight. Rather, he contemplates this effort, in its relation to the science of the law, as a workman who feels, as he gazes upon a noble cathedral, shimmering in beauty, a very type of spiritual aspiration from tessellated pavement to lofty spire, that he helped to build that structure, for did not his faithful back carry mortar to the skilled workmen? May worthier minds find use for the material this book contains.

JOHN H. GILLETT.

HAMMOND, IND., August 2, 1897.

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INDIRECT AND COLLATERAL EVIDENCE

CHAPTER I.

ADMISSIONS.

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§ 1. Term, how used—Reason for receiving admissions.—

The term admissions, as ordinarily used in the books, refers to the non-contractual, self-disserving statements of parties to the record or their privies, whether in civil or criminal cases, excluding, however, direct acknowledgments of guilt, which, when made in the latter class of cases, are termed confessions. "On a principle of good faith and mutual convenience, a man's own acts are evidence against himself."¹ The force of the statement of Gibson, C. J.,² that the pocket is "as good a touchstone of truth as the conscience," is appreciated, but the observation of the learned chief justice does not exhaust the philosophy of the competency of admissions, as an effort will be made to show in the next section. The self-disserving statements of third persons, not in privity with the litigant, are received only in a limited class of cases.³ A reason for this distinction can not be suggested which will meet every case. As applicable to most cases, however, it may be suggested, since there may be an undisclosed motive overbalancing the apparent one, that a good reason ordinarily for excluding the declarations of third persons contrary to their seeming interest lies in the fact that the party can not always prove, or his counsel suggest in argument, the explanation, if any there be, which will neutralize, or break the force of, the declaration.

¹ Starkie on Ev., vol. 1, p. 59.

² See *post*, chapters v, vi, ix.

³ Riddle v. Dixon, 2 Pa. St. 372, 44 Am. Dec. 207.

Admissions will admit of a further sub-classification, as the black letter words of the sections of this chapter will indicate, but such statements may be classified, in a general way, as express and implied.

§ 2. **Admissions before interest attached.**—Every individual is under an implied compact with society to speak the truth. He ought not to complain, therefore, if a court of justice should adjust his affairs, when required to do so, in accordance with his statement concerning them, even if he had no interest at the time which was disserved by what he said. There are, however, a few decisions in which the courts have been so tender of convicting parties out of their own mouths that they insist that the declaration must be self-disserving, if it is admitted. The particular holding in these cases is that the admissions of a devisee or legatee as to the testator's mental condition, made before the execution of the will, are not competent, because the statements were not at the time opposed to the declarant's interest.¹ This ruling has met with deserved dissent elsewhere.² The doctrine is recognized, and will be elsewhere discussed,³ that the admissions of parties who represent others, made before they were clothed with their trust, are not competent, but this rule is not for the benefit of such parties, but for the protection of those whom they represent. It sometimes happens that at the time a statement is made it is not against interest, but that subsequently an unapprehended event is born, which, because of its relation to the fact admitted, makes the former indifferent statement one that the party making it would gladly recall. A man is found murdered. A person is put on trial for the offense, and it happens that he admitted that he was in the company of the deceased at a time and place which, if the fact were true, would be a link in the chain of evidence against the defendant. According to the principle of the criticised cases, instead of accepting the defendant's statement, if satisfactorily proved, that he

¹ *Thompson v. Thompson*, 13 Ohio overruling *Dillard v. Dillard*, 2 Strob. St. 356; *Burton v. Scott*, 3 Rand. 399. 89. See *Morton v. Massie*, 3 Mo. 482.

² *Peeples v. Stevens*, 8 Rich. L. 198, ³ *Post*, § 46.

was present at such time and place, the jury, before it could give weight to the statement, would have to consider whether the defendant knew of the murder at the time he made the statement, to the end that it might be determined whether the statement was self-disserving or merely indifferent. In the parable of Holy Writ, the slothful servant, who had kept the pound entrusted to him in a napkin, sought to excuse his omission to gain anything with the money, by making what he intended as a self-serving declaration, when he said: "For I feared thee, because thou art an austere man; thou takest up that thou layest not down, and reapest that thou didst not sow." But the master did not reason that the declaration should be disregarded, because, although self-disserving in form, it was intended as a matter of excuse, but like the practical man that he was, he answered: "Out of thine own mouth will I judge thee, thou wicked servant."

§ 3. **Admissions in pleadings.**—This subject seems to be in some confusion. In the first place, it is to be recollected that the doctrines relating to admissions in the law of pleading have no application where the question arises as to the effect of a pleading as an admission in a collateral suit; as, for instance, it would be apparent that the failure of a party to traverse an allegation in his adversary's pleading could not be accepted as an admission in another suit that the non-traversed allegation was true. Many of the cases which discuss the question as to whether a pleading withdrawn is to be treated as evidence will be found to hold merely that it is not evidence *ex proprio vigore*, and that the question whether it would have been competent if it had been formally offered in evidence was not determined. These cases can rest on no other foundation. As said by Elliott, J.,¹ "If it be true, as it undeniably is, that an admission in a pleading operates against a party, then it must also be true that he can not, by any act of his own, destroy its competency. To hold otherwise would be to declare that a party may, by a retrac-

¹ *Boots v. Canine*, 94 Ind. 408.

tion, deprive his adversary of admissions previously made, and surely no one will seriously contend that this can be the law." Bills, as well as answers, in chancery have always been regarded as evidence.¹ The ground of their admission is that they are presumed to truly state the facts.² And this being correct, there is no reason why, under a system of practice requiring pleadings to state facts, pleadings filed in courts of law should not be evidence.³ If a party should lead a jury to conclude that a statement had been made in his pleading without his volition, the admission would not likely be one to which any weight would be attached, but its admissibility can not, even under such circumstances, if the practice requires that pleadings shall state facts, be seriously doubted, when the pleading is considered, as it should be, as an act of agency. The attorney is undoubtedly the agent of the party in filing the pleading, and in the discharge, and as a part of the performance, of that duty, he makes a statement. The declarations of other agents are always admitted under such circumstances, and there is no good reason why the solemn admission of an attorney in a pleading should not be received. The weight of authority, at least in jurisdictions where pleadings are required to state facts, authorizes the reception of such evidence.⁴

§ 4. **Paying money into court.**—The effect of paying money into court is to work a conclusive admission of the plaintiff's right to recover to the extent of the payment.⁵ But if the

¹ Buller's *Nisi Prius*, 235.

² *Boots v. Canine*, 94 Ind. 408; *Gresley Eq. Ev.*, 13.

³ *Boots v. Canine*, 94 Ind. 408; *Cook v. Barr*, 44 N. Y. 156.

⁴ *Cook v. Barr*, 44 N. Y. 156; *Fogg v. Edwards*, 20 Hun 90; *Strong v. Dwight*, 11 Abb. Pr. N. S. 319; *Bliss v. Nichols*, 12 Allen 443; *Hammatt v. Russ*, 16 Me. 171; *Tabb v. Cabell*, 17 Gratt. 160; *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. Rep. 92; *Boots v. Canine*, 94 Ind. 408; *Broadrup v. Woodman*, 27 Ohio St. 553; *Hobson v. Ogden*, 16 Kan. 388; *Ayres v. Hartford Fire Ins. Co.*,

17 Iowa 176; *Meade v. Black*, 22 Wis. 241; *Kiddie v. Debrutz*, 1 Hayw. 420; *Mims v. Mims*, 3 J. J. Marsh. 103; *Hunter v. Jones*, 6 Rand. 541; *Gale v. Shillock*, 4 Dak. 182, 29 N. W. Rep. 661; 1 Whart. on Ev., § 838. *Contra*, *Kimball v. Bellows*, 13 N. H. 58; *Vogel v. Osborne*, 32 Minn. 167, 20 N. W. Rep. 129.

⁵ *Dyer v. Ashton*, 1 B. & C. 3; *Yate v. William*, 2 East 128; 2 Starkie on Ev., 600; *Blackburn v. Scholes*, 2 Camp. 341; *Lipscombe v. Holmes*, 2 Camp. 441; *Boyden v. Moore*, 5 Mass. 365; *Jones v. Hoar*, 5 Pick. 285.

plaintiff would recover beyond the amount of the payment, he must prove his right to do so.¹

§ 5. **Admissions implied from silence.**—Silence, when a statement is made in a party's presence affecting his rights, and when he is fairly called on to speak, is frequently spoken of as an implied admission.² It has been questioned, however, whether the omission to speak under such circumstances should be characterized otherwise than as a fact tending to raise an unfavorable presumption against the party.³ If a party is silent when he ought to have denied, the presumption of acquiescence arises. The natural inference is that the imputation or other statement was well founded, or he would have repelled it.⁴ Before the acquiescence of a person in the language or conduct of another can be assumed as a concession, if that be not too strong a word, of the truth of the matter stated or implied, it must appear that the language was heard or the conduct understood by the party at the time.⁵ It is not enough that it was made only in his bodily presence, as when he was unconscious from sleep or stupor.⁶ If it is doubtful upon the evidence whether the party heard or under-

¹ *Ribbans v. Crickett*, 1 B. & P. 264; *Hitchcock v. Tyson*, 2 Esp. 481, note. *Richards v. State*, 82 Wis. 172, 51 N. W. Rep. 652. See *post*, § 7.

² *People v. Lewis*, 62 Hun 622, 16 N. Y. Supp. 881; *Foster v. Trenary*, 65 Iowa 620, 22 N. W. Rep. 898; *Batturs v. Sellers*, 5 Har. & John. 117. ³ *Com. v. Harvey*, 1 Gray 487; *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Sauls v. State*, 30 Tex. App. 496, 17 S. W. Rep. 1066; *Cabiness v. Hol-*

land, (Tex. Civ. App.) 30 S. W. Rep. 63. Where a party was in a room divided by a partition, in which there was an open door, and statements adverse to his interest were made by a person on the other side of the partition, it was held that the statements were inadmissible in the absence of any proof that they could have been heard by the party. *Yale v. Dart*, (N. Y. City Ct.) 17 N. Y. Supp. 179.

⁴ *Gibney v. Marchay*, 34 N. Y. 301; *State v. Cleaves*, 59 Me. 298; *State v. Reed*, 62 Me. 129; *Watt v. People*, 126 Ill. 9, 18 N. E. Rep. 340. Inculpatory statements made in the presence and hearing of one accused of crime, which he, having an opportunity to do so, does not deny, and the truth or falsity of which is within his personal knowledge, are competent to go in evidence because of the acquiescence. ⁵ *Lanergan v. People*, 39 N. Y. 89.

stood the statement, the question should be submitted to the jury.¹ To make the evidence of any value it must appear that the truth was within the knowledge of the party at the time.² The circumstances must have been such, in order to affect him, that he was not entitled to pass the matter by in silence as a mere piece of impertinence.³

§ 6. **Silence when claim asserted.**—Within the principle of the leading doctrine of the preceding section are cases where claims or demands are asserted in the presence of the party it is sought to hold responsible for them, and such party does not deny them. Thus, where a conversation occurred between the plaintiff and the defendant, in which the plaintiff asserted a claim against the defendant based on a contract with an alleged agent of the defendant, it was held proper to ask the plaintiff if the defendant denied the agency.⁴ In insurance cases *ex parte* proofs of loss are made pursuant to the almost universal requirements in insurance policies that such course shall be pursued by claimants. The fact of the presentation of such claims can not be relied on as proof of the facts concerning the loss therein stated,⁵ although silence under such circumstances might tend to prove that a policy had been issued. In one case, where the plaintiff sought to prove the facts concerning the death of the person upon whose life the insurance was written, by proving the presentation of an affi-

¹ *State v. Perkins*, 3 Hawkes 377.

² *Peck v. Ryan*, 110 Ala. 336, 17 So. Rep. 733; *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672.

³ *Whart. on Ev.*, § 1138. See, as to remarks made to others in his presence, particularly by a stranger, *Com. v. McDermott*, 123 Mass. 440; *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672; *Moore v. Smith*, 14 S. & R. 388; *State v. Young*, 99 Mo. 666, 12 S. W. Rep. 879; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

⁴ *Warburton v. Camp*, 112 N. Y. 683, 20 N. E. Rep. 592. Where the plaintiff

had numerous interviews with the president, general manager and division superintendent of a railway company, concerning his damages by the setting back of water upon his land by the railroad, it was held proper for the plaintiff to testify that in none of the interviews was any denial made of the facts asserted by him. *Proctor v. Old Colony R. R.*, 154 Mass. 251, 28 N. E. Rep. 13.

⁵ *Citizens, etc., Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360; *Thurston v. Murray*, 3 Bin. 326; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 12 S. E. Rep. 18.

davit of death to the defendant, the court, in holding the evidence incompetent, said: "It is a mere 'side-wind' evidence, a class of evidence than which none not absolutely false could be more pernicious."¹ Such evidence, where sent to the company by letter, might be rejected on another principle, concerning unanswered letters, but it would also be inadmissible for the reason that proofs of loss are made, not with the expectation that they will evoke a response from the company, but because the company has contracted for it, in order that at an early date after the facts have transpired upon which it is sought to be held liable, it may be afforded an opportunity to investigate the claim for itself.

§ 7. **Silence while under a criminal charge.**—It was held in a Massachusetts case,² that if a person is in custody charged with crime, his silence, when statements inculcating him are made in his presence, is not evidence. That case was sought to be explained in New York,³ on the ground that it did not appear that the truth was within the defendant's knowledge at the time, and it may be also suggested that it did not appear that the statement was made to the defendant—a circumstance of some importance in determining the preliminary question of competency.⁴ But, however this may be, it is held in the later Massachusetts cases⁵ that the circumstance that the defendant is under arrest, while it affects the weight of an admission by silence, does not destroy its competency, and this is the rule elsewhere.⁶

§ 8. **Silence where there is no right to speak.**—A person can not be held to acquiesce in a statement where the proprieties

¹ *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751.

² *Com. v. Kenney*, 12 Met. 235, 46 Am. Dec. 672.

³ *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342.

⁴ See *Com. v. Walker*, 13 Allen 570; *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120.

⁵ *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Crocker*, 108 Mass. 464.

⁶ *Kelley v. People*, 55 N. Y. 565; *People v. Wentz*, 37 N. Y. 303; *McKee v. People*, 36 N. Y. 113; *Murphy v. State*, 36 Ohio St. 628; *Donnelly v. State*, 26 N. J. L. 601; *State v. Murray*, 126 Mo. 611, 29 S. W. Rep. 700. See *United States v. Brown*, 4 Cranch C. C. 508; *Bob v. State*, 32 Ala. 560; *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448.

of the occasion require him to be silent. In one instance, a minister referred to the terms of his employment, during the course of a sermon, and it was held, although his statements were not contradicted, that it was not competent to show such un-denied statements, in a suit against the church on the contract.¹

§ 9. **Same subject—Silence during court proceedings.**—To what extent shall a party be taken to admit as true the statements of witnesses by an omission to contradict them? In a Massachusetts case² it was said by Shaw, C. J.: “Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered,—though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution.” And it may be added that the rule should not be so applied as to break down the constitutional right of a defendant in a criminal case to refuse to testify.³ But while adverse inferences may be drawn against a party, in a case on

¹ *Johnson v. Trinity Church Society*, 11 Allen 123.

² *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

³ *Coleman v. State*, 111 Ind. 563, 13 N. E. Rep. 100; *Com. v. McCabe*, 163 Mass. 98, 39 N. E. Rep. 777. See as to the failure to offer testimony, *Com. v. Hardiman*, 9 Gray 136; *Hall v. Vanderpool*, 156 Pa. St. 152, 26 Atl. Rep. 1069; *Louisville, etc., R. Co. v. Thomp-*

son, 107 Ind. 442, 9 N. E. Rep. 357, 8 N. E. Rep. 18, 57 Am. Rep. 120; *Cole v. Lake Shore, etc., R. Co.*, 81 Mich. 156, 45 N. W. Rep. 983; *The Fred M. Lawrence*, 15 Fed. Rep. 635; *Bleecker v. Johnston*, 69 N. Y. 309; *Com. v. McCabe*, 163 Mass. 98, 39 N. E. Rep. 777; *Clarke v. State*, 78 Ala. 474, 6 So. Rep. 368, 56 Am. Rep. 45; *State v. Cousins*, 58 Iowa 250, 12 N. W. Rep. 281.

trial, by reason of a failure to offer evidence, the doctrine ought not to be extended by applying it to collateral suits. In such cases the failure to deny the testimony of a witness, or even the production of a witness who testifies incidentally concerning a subsequently controverted matter, could scarcely be considered as an admission in a collateral suit. The following reasons suggest themselves as enforcing the conclusion stated: First. The character of court proceedings is such that the litigant can not deny the statement immediately, as he might in conversation;¹ second, as it is not to be presumed that testimony is manufactured for the occasion, the party must, in order to gain the advantage of particular testimony, put a witness upon the stand and permit him to state the facts as he understands them; it is burden enough to require a party to vouch for his witness upon the point upon which he produces him in the cause on trial; third, the establishment of such a practice would oftentimes require a litigant, in order to escape the consequences in another suit of an admission by acquiescence, to array his own testimony against that of his witnesses upon points which, for the purposes of the case on trial, were comparatively, or altogether, unimportant. The weight of authority excludes such evidence.² It has been held in Massachusetts³ that the filing of a deposition in a cause is not such an adoption of the statements of the witness as to make them evidence in a different suit. In an English case⁴ the court held that the failure of the plaintiff, who was present at the taking of a deposition in another cause, in which he was a party, to exercise his right to cross-examine the witness, did not make his statements competent as admissions in the collateral action.

¹ As said in *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64: "A denial or contradiction under such circumstances would produce great confusion and cause continual wrangling between party and witnesses. There is a certain regularity, order and decorum required in such proceedings, which precludes parties from interposing with denials and objections as they could in common conversations."

² *Melen v. Andrews*, 1 Moody & M. 336; *State v. Mullins*, 101 Mo. 514, 14 S. W. Rep. 625; *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64; *Hovey v. Hovey*, 9 Mass. 216; *Broyles v. State, ex rel.*, 47 Ind. 251, 1 Greenl. on Ev., § 197, note; *Whart. on Ev.*, § 1139.

³ *Hovey v. Hovey*, 9 Mass. 216.

⁴ *Melen v. Andrews*, 1 Moody & M. 336.

§ 10. **Unanswered letter.**—It was stated by Lord Tenterden¹ that “what is said to a man before his face he is in some degree called upon to contradict, if he does not acquiesce in it, but not answering a letter is quite different; and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains.”² Where, however, the letter has been invited, answered, acted upon, or in some other way sanctioned, it will be evidence, if it may be inferred upon the whole that there has been an acquiescence in its statements.³

§ 11. **Admission by acquiescence.**—A close analogy exists between admissions implied from a party's silence, where statements adverse to his interest are made, and admissions implied from the failure to assert rights, or to object to acts of aggression upon the part of others. Forbearance from acts of ownership, and neglect to interpose when others are exercising such acts, is evidence for the jury, in the nature of an admission.⁴ Coupled with certain other elements, such an admission will be conclusive, or, in other words, will constitute an estoppel *in pais*, but it is not deemed advisable to treat in a cursory way a subject of such magnitude. While, as we have seen,⁵ the possession of an unanswered letter is not to be treated as an admission, yet the law, in recognition of the custom among merchants, treats as an account stated an account

¹ Fairlie v. Denton, 3 Car. & P. 103.

² To same effect, Dutton v. Woodman, 9 Cush. 255, 57 Am. Dec. 46; Com. v. Edgerly, 10 Allen 184; Fearing v. Kimball, 4 Allen 125, 81 Am. Dec. 690; Smith v. Shoemaker, 17 Wall. 630; People v. Green, 1 Park. Cr. R. 11; Talcott v. Harris, 93 N. Y. 567; Learned v. Tiltonson, 97 N. Y. 1, 49 Am. Rep. 508; Thomas v. Gage, 141 N. Y. 506, 36 N. E. Rep. 385; St. Louis, etc., R. Co. v. Thomas, 85 Ill. 464; Spies v. People, 122 Ill. 1, 12 N. E. Rep. 865, 3 Am. St. Rep. 320; Sullivan v. McMillan, 26 Fla. 543, 8 So. Rep. 450; People v. Col-

burn, 105 Cal. 648, 38 Pac. Rep. 1105; Lee v. Cooley, 13 Ore. 433, 11 Pac. Rep. 70; Rex v. Plumer, Rus. & Ry. C. C. 264; 1 Greenl. on Ev., § 198, note.

³ Com. v. Eastman, 1 Cush. 189, 48 Am. Dec. 596; Sullivan v. McMillan, 26 Fla. 543, 8 So. Rep. 450; Fenno v. Weston, 31 Vt. 345; Haynes v. Crutchfield, 7 Ala. 189; Spies v. People, 122 Ill. 1, 12 N. E. Rep. 865, 3 Am. St. Rep. 320; Lee v. Cooley, 13 Ore. 433, 11 Pac. Rep. 70.

⁴ Phil. on Ev., (1849 ed.) 355; 1 Greenl. on Ev., § 197.

⁵ *Supra*, § 10.

which a person has received by mail and has failed to object to within a reasonable time.¹

§ 12. **Collateral admissions.**—It sometimes happens that a person by his words or conduct impliedly admits some collateral fact. Thus, where one was charged with bribing a voter, it was held that proof of the attempt to bribe was evidence that the party thus corruptly approached had the right to vote.² A common illustration of collateral admissions is found in cases where a person by exercising some office or function is held to thereby admit that he exercises such office or function by authority.

§ 13. **Admissions by conduct.**—A few illustrations must suffice for the treatment of a doctrine so easily understood. Where a person asserts a claim, it is proper to show that in a prior settlement with the party against whom the claim is asserted he did not make his claim known.³ In a suit for salary as the treasurer of a corporation, it was held that the defendant might show, as bearing on the question as to whether there was a contract, that in making a statement of the corporation's liabilities the plaintiff did not make an item of his salary.⁴ It is competent to show, as tending to rebut the defense to an action, that upon a former trial of the same action such defense was not asserted.⁵ Where plaintiff's decedent was run over and killed, by reason of the fact that his foot was caught in the angle of a frog, it was held proper to prove a prior general order of defendant company requiring

¹ *Sherman v. Sherman*, 2 Vern. 276; *Willis v. Jernegan*, 2 Atk. 251; *Tickel v. Short*, 2 Ves. Sr. 239; *Wiggins v. Burkham*, 10 Wall. 129; *Oil Co. v. Van Etten*, 107 U. S. 325; *Field's Assignees v. Moulson*, 2 Wash. C. C. 155; *Corps v. Robinson*, 2 Wash. C. C. 388; *Freedland v. Heron*, 7 Cranch 147; *Killam v. Preston*, 4 W. & S. 14.

² *Combe v. Pitt*, Burr. 1586; *Rigg v. Curgenvin*, 2 Will. 395.

³ *Miller v. Stevens*, 13 Gray 282.

⁴ *Sears v. Kings Co. Elevated R. Co.*, 152 Mass. 151, 25 N. E. Rep. 98.

⁵ *Sellers v. Stevenson*, 163 Pa. 262, 29 Atl. Rep. 715. See *Clement v. Kimball*, 98 Mass. 535. Where the plaintiff charged that defendant by its servants wrongfully threw him off its car, it was held competent to prove by those who first came to plaintiff's aid that he did not make any such claim to them. *Kummer v. Christopher, etc., R. Co.*, (N. Y. Com. Pl.) 20 N. Y. Supp. 116.

all frogs to be blocked, as a circumstance in the nature of an admission that some unprotected frogs are dangerous to employes.¹ Evidence of the demeanor of the defendant when arrested is competent,² and evidence of a declaration accusing him of the crime charged may be offered, in order to give point to his demeanor and statements when accused.³ Changes made by the defendant in the stolen property, rendering identification more difficult, may be considered as in the nature of an admission of guilt.⁴ The omission of an administrator to inventory certain property, if not sufficiently explained, may be regarded as an admission that he was not claiming it.⁵ Where the defendant was charged with injuring plaintiff's horse by overdriving, it was held that the plaintiff was entitled to prove that immediately after the commission of the alleged unlawful act the defendant made a conveyance of all of his property, without consideration, as a circumstance tending to show that he was conscious of his liability, and seeking to escape the payment of damages.⁶ Under this head the subjects of flight,⁷ the

¹ *Coates v. Burlington, etc., R. Co.*, 62 Iowa 486, 17 N. W. Rep. 760.

² *State v. Phelps*, 5 S. D. 480, 59 N. W. Rep. 471; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636. The fact that the defendant was drinking heavily soon after the commission of the crime is proper. *People v. O'Neill*, 112 N. Y. 355, 19 N. E. Rep. 796. Where the defendant was charged with the murder of his wife, it was held admissible to show his indifference to her while she was in life, and his gratification at being rid of her. *People v. Buchanan*, 145 N. Y. 1, 39 N. E. Rep. 846.

³ *State v. Dillon*, 74 Iowa 653, 38 N. W. Rep. 525.

⁴ *State v. Miller*, 45 Minn. 521, 48 N. W. Rep. 401.

⁵ *Bradshaw v. Mayfield*, 18 Tex. 21.

⁶ *Banfield v. Whipple*, 10 Allen 27, 87 Am. Dec. 618.

⁷ *State v. Palmer*, 65 N. H. 216, 20 Atl. Rep. 6; *Com. v. Brigham*, 147 Mass. 414, 18 N. E. Rep. 167; *State v.*

Ellwood, 17 R. I. 763, 24 Atl. Rep. 782; *Jamison v. People*, 145 Ill. 357, 34 N. E. Rep. 486; *Williams v. State*, 22 Tex. App. 497, 4 S. W. Rep. 64; *State v. Lee*, 17 Ore. 488, 21 Pac. Rep. 455; *People v. Fine*, 77 Cal. 147, 19 Pac. Rep. 269; *People v. Clark*, 84 Cal. 573, 24 Pac. Rep. 313. The defendant is entitled to account for the fact of his flight. *State v. Moncla*, 39 La. Ann. 868, 2 So. Rep. 814. See *People v. Clark*, 84 Cal. 573. But he can not offer evidence in the first instance that he did not flee. See *post*, § 231. No presumption of guilt can be drawn from the fact of flight from a mob. *State v. Ma Foo*, 110 Mo. 7, 19 S. W. Rep. 222, 33 Am. St. Rep. 414. Evidence of flight may be given, although there was at the time no actual or threatened prosecution. *State v. Findley*, 101 Mo. 217, 14 S. W. Rep. 185.

"Suspicion always haunts the guilty mind,
The thief doth fear each bush an officer."

suppression and fabrication of evidence, and the bribery or intimidation of witnesses or jurors might be treated,¹ but such a discussion belongs properly to the subject of presumptions, and the limitations upon this work render it impossible to consider that subject, except in an incidental manner.

§ 14. Admissions by possession of books and documents, and implements of crime.—We have already seen that the receipt and possession of an unanswered letter is not an admission. Doubtless, the reason for this is that such a letter is distinctly the emanation of another. But it is obvious that entries made in partnership books stand on a different ground. As said by Mills, J., in delivering the opinion of the court in a Kentucky case:²

¹ See *Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. Rep. 851; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *The Count Joannes v. Bennett*, 5 Allen 169, 81 Am. Dec. 738; *Murray v. Lepper*, 99 Mich. 135, 57 N. W. Rep. 1097; *Houser v. Austin*, 2 Idaho 188, 10 Pac. Rep. 37; *State v. Crowder*, 41 Kan. 101, 21 Pac. Rep. 208; *People v. Chin Hane*, 108 Cal. 597, 41 Pac. Rep. 697. A person who tails and refuses to produce evidence may be treated as a spoliator of evidence. *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N. E. Rep. 932; *Hastings v. Stetson*, 130 Mass. 76; *Easter v. Allen*, 8 Allen 7; *Egan v. Bouker*, 5 Allen 449; *Kidd v. Ward*, 91 Iowa 371, 59 N. W. Rep. 279; *Turner v. State*, 102 Ind. 425, 1 N. E. Rep. 869; *Snell v. Bray*, 56 Wis. 156, 14 N. W. Rep. 14. "The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defense, if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that the recourse to falsehood leads fairly to the inference of guilt. Anything from which

such an inference can be drawn is cogent and important evidence with a view to the issue. So, if you can show that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive. I fully agree that it should be put to the jury with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, or that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action, any more than a prisoner's making a false statement to increase his appearance of innocence is necessarily a proof of guilt; but it is always evidence which ought to be submitted to the consideration of the tribunal which is the judge of the facts." *Cockburn, C. J.*, in *Moriarty v. London, etc., R. Co.*, 5 L. R. Q. B. 314.

² *Simms v. Kirtley*, 1 T. B. Monroe 80.

"From the very nature of the case, the books of a partnership must be evidence between the partners themselves. Their situation is one of confidence. They agree to unite and, as to others, to become one person; and the books of the firm are to speak their language and record their joint transactions; and there is an understanding that these books are to be appealed to, to tell their true situation. To admit them as evidence, then, is only effectuating their agreement, and using their own criterion and test, to ascertain the truth. Such books, therefore, kept subject to the inspection of each, must be admitted as correct until the contrary is shown."¹ But the presumption of the competency of the partnership books as against a partner may be rebutted by proof of special circumstances as to such partner, such as residence in a distant place or non-access.² Of course, as to one who engages in a controversy with a partnership or corporation, as such, there is no question as to his right to avail himself of the admissions contained in the regular books of such entity. As against a stockholder, however, while the corporate records are the best evidence of *what the corporation did*, yet, according to the weight of authority, the stockholder does not occupy such a relation to the corporation, as will permit the introduction of its books against him, as evidence of their mutual relations and obligations,³ and this doctrine has been recently extended to a director.⁴ Where a suit was brought by a clerk for services, and the fact was in dispute as to whether the rate of wages was six or

¹ See, also, *Reno v. Crane*, 2 Blackf. 217; *Moyes v. Brumaux*, 3 Yeates 30; *Jordan v. White*, 4 Mart. N. S. (La.) 335; *Heartt v. Corning*, 3 Paige 566. In *Grant v. Masterton*, 55 Mich. 161, 20 N. W. Rep. 885, it was held that it was proper to show an entry in the books of a partnership of a transaction beyond its scope, as it tended to show that the transaction had been ratified. Within the same principle, entries made by the servants of a club have

been admitted as against its members. *Raggett v. Musgrave*, 2 C. & P. 556.

² *United States Bank v. Binney*, 5 Mason 176.

³ *Haynes v. Brown*, 36 N. H. 545; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 26 N. E. Rep. 534, 21 Am. St. Rep. 662; *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. Rep. 1046. See *Thompson's Commentaries on Corporations*, vol. 6, § 7728, *et seq.*

⁴ *Rudd v. Robinson*, *supra*.

twelve dollars a week, and as to whether certain payments had been made, it was held that the books of the defendant were not evidence, although there was testimony that plaintiff had access to them and had been seen looking over them. In passing on the question the court said: "The books were not the plaintiff's books or kept on his behalf. He was not a partner, and had no interest in them; so that there was no ground for a presumption, from the fact of access, that he knew their contents. On the evidence above stated, it would be a mere guess whether he had seen the items in question."¹ From the subjects under discussion to the subject of presumptions of guilt based on the possession of implements of crime may seem like a far cry, but, notwithstanding the dissimilarity of the subjects, the basis of the presumption in all these cases is the same, namely, the party's acquiescence in a matter over which he was entitled to exercise, or was actually exercising, some degree of control.

§ 15. **Admissions made under compulsion.**—While duress will operate to exclude both an admission and a confession, yet the law distinguishes between the two, in that if the compulsion is legal, an admission made under such circumstances is competent,² while a confession must be purely voluntary or it is excluded.

§ 16. **Admission of matter of law.**—Although all persons are presumed to know the law, yet this is a mere *præsumptio juris*, which is indulged in order to furnish a basis for the administration of justice. The law, for some purposes at least, recognizes the fact that persons are often ignorant of it, and for this reason, as well as the further one that the law is what it is, and not what a person, in a self-disserving way, declares it to be, it follows that an admission of a pure matter of law can not be received in evidence.³ In one case,⁴ where the question was as

¹ *Cheney v. Cheney*, 162 Mass. 591, 39 N. E. Rep. 137.

² *Slack v. Buchannan*, 1 Peake 5; *Collett v. Keith*, 4 Esp. 212; *Stockfleth v. DeTastet*, 4 Camp. 10.

³ *Polk's Lessee v. Robertson*, 11 Overton (Tenn.) 456; *Moore v. Hitchcock*, 4 Wend. 292; *Colt v. Selden*, 5 Watts 525.

⁴ *Crockett v. Morrison*, 11 Mo. 3.

to the competency of an admission by a party that he expected to lose his suit, the court, in holding the statement inadmissible, states that an admission containing a mixed matter of law and fact can not go in evidence. The exclusion of the declaration was doubtless right, as there was no ultimate matter of fact stated, and it was impossible to determine from it whether the declarant's conclusion was based on the insufficiency of the facts in the case or his view of the law. The authorities, however, do not warrant so broad a statement as the case makes.¹ It has been many times held that an admission of the existence of the marriage alleged, made by a defendant in a prosecution for bigamy or adultery, may be received.² In a Pennsylvania case, where the defendant was charged with negligence, evidence was held admissible of the defendant's declaration that he was in fault.³

§ 17. **Admission as to writing.**—It was a matter of doubt for many years, both in England and this country, whether admissions could be received as to the contents of writings. The disposition existed to regard such evidence as secondary. But the case of *Slatterie v. Pooley*,⁴ decided by the Court of Exchequer in 1840, reinforced by the authoritative opinion of Mr. Best, in his learned treatise on evidence,⁵ has given the cases a tendency to admit such declarations. In the case mentioned,

¹ 1 Greenleaf on Ev., § 97.

² *Miles v. United States*, 103 U. S. 304; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *State v. Hilton*, 3 Rich. L. 434, 45 Am. Dec. 783; *Williams v. State*, 44 Ala. 24; *Warner v. Com.*, 2 Va. Cas. 95; *State v. Seals*, 16 Ind. 352; *Squire v. State*, 46 Ind. 459; *State v. McDonald*, 25 Mo. 176; *United States v. Tenney*, (Ariz.) 11 Pac. Rep. 472; *Owens v. State*, 94 Ala. 97, 10 So. Rep. 669. There are cases, such as *Hayes v. People*, 24 How. Pr. 453, *Eisenlord v. Clum*, 128 N. Y. 552, 27 N. E. Rep. 1024, *State v. Armstrong*, 4 Minn. 335, *State v. Wilson*, 22 Iowa 364; *State v.*

Marvin, 35 N. H. 22, and *Jacobson v. Siddal*, 12 Ore. 280, 7 Pac. Rep. 108, 53 Am. Rep. 360, in which the fact of the prior marriage is regarded as a part of the *corpus delicti*, and it is therefore a rule in these jurisdictions that there shall not be a conviction in this class of cases without proof of the fact of marriage, but even the cases last cited authorize the use of the defendant's admission as corroboratory proof.

³ *Dennison v. Miner*, (Pa. St.) 2 Atl. Rep. 561. See *Stowe v. Bishop*, 58 Vt. 498, 3 Atl. Rep. 494, 56 Am. Rep. 569.

⁴ *Slatterie v. Pooley*, 6 M. & W. 664.

⁵ Best on Ev., § 525.

Park, B., says: "The reason why such parol statements are admissible, without notice to produce or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that such evidence is admissible." This decision has established the law in England;¹ it has, however, been criticised by Chief Justice Pennefather in Ireland,² and Mr. Taylor, while yielding assent to its authority, has questioned its soundness.³ Their objection to it is based, not on principle, but on the inexpediency of putting established rights in peril by receiving parol evidence of that which is committed to writing. Of this objection Mr. Best says:⁴ "Now, we must protest, *in toto*, against trying the admissibility of evidence by such a test as this. The most respectable and innocent man in the community may be hanged for murder on the unsupported testimony of a pretended accomplice; or sent to penal servitude for rape, on the unsupported oath of an avowed prostitute; but is this a reason for altering the law with reference to the admissibility of the evidence of accomplices or prostitutes, or do innocent men feel themselves in danger from it?"⁵ The few authorities in the United States upon the subject for the most part sanction the English doctrine.⁶ It is doubtless the law, however, that such

¹ See cases in Best on Ev., § 526.

the case of *Gibblehouse v. Strong*, 3

² *Lawless v. Quearle*, 8 Ir. L. Rep. 382.

Rawle 437.

³ Taylor on Ev., § 411.

⁵ *Loomis v. Wadhams*, 8 Gray 557;

⁴ Best on Ev., § 526.

Smith v. Palmer, 6 Cush. 513; *Edgar*

⁶ Much the same argument as that of the author just quoted is used in

v. Richardson, 33 Ohio St. 581, 31 Am. Rep. 571; *Bivins v. McElroy*, 11 Ark. 23, 52 Am. Dec. 258; *Wharton on Ev.*,

evidence must yield to the force of a record title, and that while the *execution* of a written instrument relating to a contract within the statute of frauds may be shown by admission, yet the naked admission of a right, not shown to be in writing, can not be asserted to the defiance of the statute.¹

§ 18. Same subject—Admissions are primary evidence.—The underlying principle of *Slatterie v. Pooley*² is that admissions are substantive or primary evidence.³ In an English case,⁴ Patterson, J., said: “*Slatterie v. Pooley*⁵ establishes that, if a party by words admits the contents of a written document, such admission is legal evidence against him, not as secondary evidence of the contents of the written instrument, but as original evidence.” Professor Greenleaf, who does not seem to have been familiar with the latter case, says: “Such evidence seems, therefore, more properly admissible as a substitute for the ordinary and legal proof.”⁶ Upon this subject Mr. Best states: “It is evidence in the direct, not in the collateral line, which falls within the exclusion. For the same reason it seems—although much has been said and written on both sides of the question—that self-disserving statements by a party against his own interest are receivable as primary proof of documents.”⁷ Mr. Wharton, while he fails to discriminate upon this precise point, except in so far as he may be said to

§1091. In *Cumberland Mut. Fire Ins. Co. v. Giltinan*, 48 N. J. L. 495, 57 Am. Rep. 586, the court, while recognizing the force of *Slatterie v. Pooley*, state that the New Jersey courts are committed to the old rule, although it is declared that it was never understood that the old rule extended to matters aside from and only incidental to the issue.

¹ Wharton on Ev., § 1157. See Taylor on Ev., § 413; *Bivins v. McElroy*, 11 Ark. 23, 52 Am. Dec. 258.

² *Slatterie v. Pooley*, 6 M. & W. 664.

³ To same effect see *Dent v. Dent*, 3

Gill. 482; *Barber's Adm'r v. Bennett*, 60 Vt. 662, 15 Atl. Rep. 348, 6 Am. St. Rep. 141; *Smith v. Palmer*, 6 Cush. 513; *Edgar v. Richardson*, 33 Ohio St. 581, 31 Am. Rep. 571; *Bivins v. McElroy*, 11 Ark. 23, 52 Am. Dec. 258; *Gibblehouse v. Strong*, 3 Rawle 437; *Logansport & P. G. T. Co. v. Heil*, 118 Ind. 135, 20 N. E. Rep. 703; *Earle v. Picken*, 5 C. & P. 542.

⁴ *Regina v. Basingstoke*, 14 Q. B. 611.

⁵ *Slatterie v. Pooley*, 6 M. & W. 664.

⁶ 1 Greenl. on Ev., § 169

⁷ Best on Ev., § 491.

do so by quoting approvingly from *Slatterie v. Pooley*,¹ gives implied recognition to the doctrine, by stating that admissions may be given in evidence, although the party who made them is in court.² This proposition of Mr. Wharton's is scarcely within the realm of controversy, but it efficiently determines that admissions are primary evidence, and if the writer's opinion were sought upon the controverted question involved in the case of *Slatterie v. Pooley*,³ he would state that with the point yielded that admissions are primary evidence, even of

¹ *Slatterie v. Pooley*, 6 M. & W. 664.

² Wharton on Ev., § 1094. Phillips says in his work on evidence (1849 ed., vol. 1, p. 339): "This species of evidence (referring to admissions) is of a nature which renders it unnecessary to call the author of the statement as a witness, even where he is capable of being called." The following is from the note to the *Dutchess of Kingston's Case*, as reported in Smith's *Leading Cases*: "An estoppel, therefore, is an *admission*, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive that the party whom it affects is not permitted to aver against it or offer evidence to controvert it—though he may show that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol: the fact may in each case be proved, the ordinary evidence rendered unnecessary by an estoppel; and this is no infringement on the rule of law requiring the best evi-

dence and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted, for the estoppel professes, not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted: and so too has it been held that an *admission*, which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose: for instance, in *Bringloe v. Goodson*, 5 Bing. N. C. 738, a deed was recited to be executed in pursuance of a power contained in the will of P. S. A will purporting to be that of P. S. was produced, and there was some slight evidence that it was a will of P. S. This was held sufficient evidence to go to the jury that the will produced was executed by P. S. without calling the attesting witness. 'I do not put the admission' said Tindall, C. J., 'so high as an estoppel, but it has its effect on the principle laid down in *Shelley v. Wright*, Willes 9, where a party executing a deed was held estopped by the recital of a particular fact in that deed to deny that fact.'

³ *Slatterie v. Pooley*, 6 M. & W. 664.

facts that lay in parol, it is his opinion that principle must carry the mind the full length of that case. Upon the establishment of this doctrine, as will be hereinafter shown,¹ rests the right to introduce the self-disserving declarations of predecessors in title and it is therefore of very great importance.

§ 19. **Recitals in deeds.**—Because of the solemn character of deeds, the cases without division authorize the proposition that if such an instrument contains a recital—even as to the existence or character of a writing—it may be treated as an admission as against the grantee and those claiming under him.²

§ 20. **Doctrine as to attested documents.**—An exception to the rule that a writing may be proved by admission is recognized as existing in many jurisdictions, in cases where the parties to an instrument have caused it to be attested. The persons so attesting are regarded as the plighted witnesses to the transaction, and it is held that they must be called to prove it.³ It has been laid down that this rule is so inflexible as to prevent proof of the instrument being made by the sworn testimony of the parties.⁴ But the New York courts have

¹ *Post*, § 30.

² *Ashmore v. Hardy*, 7 C. & P. 501; *West v. Davis*, 7 East 363; *Digby v. Steele*, 3 Camp. 115; *Burleigh v. Stibbs*, 5 T. R. 465; *Vorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 103; *Demeyer v. Legg*, 18 Barb. 14; *Penrose v. Griffith*, 4 Binn. (Pa.) 231; *Siltzell v. Michael*, 3 W. & S. 329. But a subsequent grantee can not be charged with such an admission, if he claims by a title derived from his grantor before the latter received the deed which is in the chain of title containing such admission. *Penrose v. Griffith*, 4 Binn. (Pa.) 231; *Hill v. Draper*, 10 Barb. 454. Such a recital is not evidence against a stranger to the title. *Fine v. St. Louis Public Schools*, 30 Mo. 166; *Dohan v. Murdock*, 40 La. Ann. 376, 4 So. Rep. 333.

Recitals in a deed are not conclusive.

Mehaffy v. Dobbs, 9 Watts 363.

³ *Hall v. Phelps*, 2 Johns. 451; *Willoughby v. Carleton*, 9 Johns. 136; *Jackson v. Kingsley*, 17 Johns. 158; *Hudson v. Puett*, 86 Ga. 341, 12 S. E. Rep. 640; *Henly v. Henning*, 7 Baxt. 524, 32 Am. Rep. 568; *Williams v. Walker*, 2 Rich. Eq. (S. Car.) 291, 46 Am. Dec. 53; *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; *Foye v. Lieghton*, 4 Fost. (N. H.) 29; *Maupin v. Triplett*, 5 Mo. 422; *Stevens v. Irwin*, 12 Cal. 306.

⁴ *Henly v. Henning*, 7 Baxt. 524, 32 Am. Rep. 568; *Taylor on Ev.*, § 1843. *Contra*, *Bowling v. Hax*, 55 Mo. 446 (overruling *Maupin v. Triplett*, 5 Mo. 422; *Glasgow v. Ridgely*, 11 Mo. 34).

shown more liberality than usual by allowing an admission of execution to go in evidence, provided that the admission is proved with great certainty,¹ and the instrument is not under seal.² To be a subscribing witness, such witness must not only be present but must sign as such.³ The rule does not apply to mere collateral writings.⁴ If the instrument is acknowledged this dispenses with the necessity of calling a witness.⁵ The rule requiring the calling of attesting witnesses is regarded by Mr. Best⁶ as a remnant of the old practice, which existed previous to *Slatterie v. Pooley*,⁷ and as a reversal of the maxim, "*omnia præsumunter rite esse acta.*" In an English case,⁸ where the obligor had admitted that he owed the debt, Lord Mansfield overruled the objection that the attesting witness was not called, stating that he considered the objection as captious, as the rule was a mere technical one. It is now

¹ *Shaver v. Ehle*, 16 Johns. 201; *Mauri v. Heffernan*, 13 Johns. 58; *Hall v. Phelps*, 2 Johns. 451. And see *Jones v. Henry*, 84 N. Car. 320, 37 Am. Rep. 624; *Pence v. Makepeace*, 65 Ind. 345.

² *Fox v. Reil*, 3 Johns. 477; *Henry v. Bishop*, 2 Wend. 575. If the witness lives out of the state his non-production will be excused. *Stevens v. Irwin*, 12 Cal. 306; *Little v. Chauvin*, 1 Mo. 626; *Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393; *Alter v. Berghaus*, 8 Watts 78. Such witness is presumed to live out of the state, if the instrument was not executed in the state. *Clardy v. Richardson*, 24 Mo. 295. Absence from the county will not excuse the production of the witness. *Hay v. Kramer*, 2 W. & S. 137. If the witness is out of the state, his handwriting may be proved. *Engles v. Bruington*, 4 Yeates 345, 2 Am. Dec. 411; *Little v. Chauvin*, 1 Mo. 626. So within this principle it would be enough if the witness was present and testified, and could only recollect the fact that he signed his name as an at-

testing witness, *Miller's Estate*, 3 Rawle 312, 24 Am. Dec. 345, although there would in that case have to be supplemental proof as to the delivery.

³ *Henry v. Bishop*, 2 Wend. 575; *Hollenback v. Fleming*, 6 Hill 303.

⁴ *Com. v. Castles*, 9 Gray 121, 69 Am. Dec. 278; *Chandler v. Caswell*, 17 Vt. 580; *Curtis v. Belknap*, 21 Vt. 433; *Rundle v. Allison*, 34 N. Y. 180.

⁵ 1 *Starkie on Ev.*, star p. 355; *Fox v. Reil*, 3 Johns. 477. *Contra*, *Little's Admr. v. Chauvin*, 1 Mo. 626. Where an instrument is produced, pursuant to notice, by a party to it, it is evidence in favor of the party calling for it. *Betts v. Badger*, 12 Johns. 223, 7 Am. Dec. 309; *Jackson v. Kingsley*, 17 Johns. 158. It is also held that the fact that an instrument is produced pursuant to notice entitles the producer to use it, even where the party calling for it did so under a mistake as to its contents. *Clark v. Fletcher*, 1 Allen 53.

⁶ *Ev.*, § 527.

⁷ *Slatterie v. Pooley*, 6 M. & W. 664.

⁸ *Abbott v. Plumbe*, 1 Doug. 216.

provided in England by statute that an instrument not required by law to be attested "may be proved by admission or otherwise, as if there had been no attesting witness thereto."¹

§ 21. **Incomplete and canceled admissions.**—It is not material to its admissibility that an admission is not signed.² The fact that an admission was but a part of a statement which was never completed will not suffice to exclude it. Thus, it was held competent in a collateral suit to introduce the admission of the opposite party made during the course of an examination under oath, although he was stopped as he was about to explain his admission.³ Where a party had given his written examination in an insolvency court, his admissions were held competent, although his examination was not signed, and although it was given with an understanding that he might submit to his counsel for revision before signing.⁴ An admission can not be effectually destroyed as long as evidence of it exists. In a Pennsylvania case,⁵ the court held that a testamentary paper, in the handwriting of the testatrix, making a certain admission, was evidence against her estate, although she had torn her signature from the writing.

§ 22. **Whole of admission, explaining or modifying context, must go in.**—It is quite plain that the party against whom an admission is introduced is entitled to the whole of the context, so far as it explains or modifies the admission, even though the rest of the statement be self-serving.⁶ But this rule will

¹ 17 and 18 Vict., c. 125, § 26.

² 1 Phil. on Ev. (1849 ed.), 370, note; *Lynde v. McGregor*, 13 Allen 182, 90 Am. Dec. 188; *In re Gracie's Estate*, 158 Pa. St. 521, 27 Atl. Rep. 1083.

³ *Collet v. Keith*, 4 Esp. 212. A witness who heard only a part of an admission may testify to what he did hear. *Post*, § 25.

⁴ *Lynde v. McGregor*, 13 Allen 182, 90 Am. Dec. 188.

⁵ *In re Gracie's Estate*, 158 Pa. St. 521, 27 Atl. Rep. 1083.

⁶ *Clark v. Fletcher*, 1 Allen 53; *Com.*

v. Goddard, 14 Gray 402; *Clark v. Smith*, 10 Conn. 1, 25 Am. Dec. 47; *Gordon v. Preston*, 1 Watts 385, 26 Am. Dec. 75; *Bennett v. Burch*, 1 Denio 141; *Bearss v. Copley*, 10 N. Y. 93; *Carver v. Tracey*, 3 Johns. 427; *Wailing v. Toll*, 9 Johns. 141; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Rouse v. Whited*, 25 N. Y. 170, 82 Am. Dec. 337; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. Rep. 899; *Turner v. Phoenix Ins. Co.*, 55 Mich. 236, 21 N. W. Rep. 326; *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So.

not permit the showing of what was said at a distinct conversation.¹ Even within the limits of the particular conversation, the right to admit declarations on cross-examination is somewhat circumscribed. A party can go no further than to prove what, if anything, he said qualifying his admission.² His statement as to the general merits of the case is incompetent.³ In a case where an indorser sued the maker of a note for money paid on such account, by a levy upon and sale of plaintiff's property, and it appeared that when the officer demanded property of the defendant the latter pointed out some property which he said belonged to plaintiff, it was held that defendant was not entitled to show that he also added that the debt was to be paid by the plaintiff, as such statement was not germane.⁴ The self-serving portions of the following declarations have been held competent: that the goods were bought and paid for;⁵ that the defendant had received the goods, but had accounted for them;⁶ that he had received a dollar, but that it was his due;⁷ that the account was correct, but that a set-off existed;⁸ that plaintiff's dog was killed, "but it was because he assaulted me in the night in the highway."⁹ Many other rulings might be mentioned, permitting statements of justification or defense to go in evidence, at least where closely connected with the admission.¹⁰ Where an entry in the book of a party has been

Rep. 46; *Spencer v. Fortesque*, 112 N. Car. 268, 16 S. E. Rep. 898; *State v. Martin*, 28 Mo. 530; *Grand Rapids, etc., Ry. Co. v. Diller*, 110 Ind. 223, 9 N. E. Rep. 710; *Veiths v. Hagge*, 8 Iowa 163; *Sims v. Moore*, 61 Iowa 128, 16 N. W. Rep. 58; *Emery v. State*, 92 Wis. 146, 65 N. W. Rep. 848; *Taylor on Ev.*, § 733.

¹ *Peake v. Hutchinson*, 5 S. & R. 295; *Galbraith v. Green*, 13 S. & R. 85; *Murray v. Coster*, 4 Cow. 617, 630; *Martin v. Root*, 17 Mass. 227; *Blight v. Ashley*, 1 Pet. C. C. 15; *Stewart v. Inhabitants*, 5 Conn. 244; *Carver v. Tracey*, 3 Johns. 427; *Fenner v. Lewis*, 10 Johns. 38.

² *Sims v. Moore*, 61 Iowa 128, 16 N. W. Rep. 58.

³ *Garey v. Nicholson*, 24 Wend. 350; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60.

⁴ *Rouse v. Whited*, 25 Barb. 279.

⁵ *Smith v. Jones*, 15 Johns. 229.

⁶ *Benedict v. Nichols*, 1 Root 434.

⁷ *Carver v. Tracey*, 3 Johns. 427.

⁸ *Jacobs v. Farrall*, 2 Hawks 570; *Oliver v. Gray*, 1 Har. & Gill 204. *Contra* *Delamater v. Pierce*, 3 Denio 315, 3 How. Pr. 162. But compare *Perego v. Purdy*, 1 Hilt. (N. Y. Com. Pl.) 269.

⁹ *Credit v. Brown*, 10 Johns. 365.

¹⁰ See *Morris v. Hurst*, 1 Wash. C. C. 433; *Waggoner v. Gray*, 2 Hen. &

read he is entitled to put in evidence an entry necessarily connected therewith,¹ but he is not entitled to use other entries not so connected.² Where detached portions of the deposition of a witness were read on cross-examination, for the purpose of contradicting him, it was held that this gave the opposite party the right to read so much of the deposition pertaining to the same subject as tended to qualify, limit or explain the answer read by the opposite party.³ In a case where the defendant was sued for an assault and battery, and the plaintiff introduced in evidence defendant's plea of guilty in a prosecution for the same unlawful act, it was held the duty of the trial court to exclude a qualifying statement made at the time the plea was entered, as it was an unqualified admission, and no accompanying statement could change its character in that respect.⁴ The fact that certain letters are read from a series of letters will not *per se* entitle the opposite party to read other letters from the series, and is not enough that they will shed some light on the transaction.⁵

§ 23. Each part of the statement not entitled to equal weight.—It is the privilege of the jury to give credit to a part of the statement, and to reject the balance.⁶ Mr. Best states,

Munf. 603; *Turner v. Jenkins*, 1 Har. & Gill 161; *Whitwell v. Wyer*, 11 Mass. 6; *Holley's Admr. v. Christopher*, 3 Monr. 14; *Trustees University of N. Car. v. Roe*, 2 Hawks 370; *Shaller v. Brand*, 6 Binn. 435, 6 Am. Dec. 482; *Bennett v. Burch*, 1 Denio 141. But a long statement of independent facts will not be admitted. *Walrod v. Ball*, 9 Barb. 271.

¹ *Withers v. Gillespy*, 7 S. & R. 10.

² *Catt v. Howard*, 3 Stark. 3; *Taylor on Ev.*, § 732.

³ *Whitman v. Morey*, 63 N. H. 448, 2 Atl. Rep. 899. See as to pleadings read in evidence, 1 Greenl. on Ev., § 202.

⁴ *Root v. Sturdivant*, 70 Iowa 55, 29 N. W. Rep. 802; *Turner v. Phoenix*

Ins. Co., 55 Mich. 236, 21 N. W. Rep. 326.

⁵ *Taylor on Ev.*, § 732. As to the right to read a letter sent in reply, see *Taylor on Ev.*, § 734; *Turner v. Phoenix Ins. Co.*, *supra*, 1 Greenl. on Ev., § 201, note.

⁶ *Kelsey v. Bush*, 2 Hill 440; *Roberts v. Gee*, 15 Barb. 449; *Penfield v. Jacobs*, 21 Barb. 335; *Mattocks v. Lyman*, 18 Vt. 98, 46 Am. Dec. 138; *Spencer v. Fortesque*, 112 N. Car. 268, 16 S. E. Rep. 898; *Green v. State*, 13 Mo. 382; *Thrall v. Smiley*, 9 Cal. 529; *Bermon v. Woodbridge*, 2 Doug. 788; *Rex v. Clews*, 4 C. & P. 221; *Smith v. Blandy*, Ry. and M. 257; *Methodist E. Church v. Jaques*, 3 Johns. Ch. 115; *Turner v. Child*, 1 Dev. 133, 17 Am. Dec. 555; *Smith v. Hunt*, 1

in his work on evidence, that "while the whole statement must be received, the credit due to each part must be determined by the jury, who may believe the self-serving and disbelieve the self-disserving portion of it, or vice versa."¹ The admission of the portion of the statement favorable to the declarant has sometimes been put upon the ground that the use of the admission waives any objection to any of the matters contained in the statement,² and it has also been suggested that the presumption or probability of the truth of those parts of a party's statement which are against interest may be looked upon as giving credit to the remainder of the statement.³ But upon whatever ground the admission of the favorable portion of the statement may be claimed, it is believed, although authority is meager upon the subject, that such portion can not be given any constructive force. Thus, in an action for defamation, where the plaintiff introduced an admission of the defendant as to the publication, but the admission was coupled with the further statement that the matters set forth were true, it was held that the latter statement did not tend to prove the truth of the publication, but that the utmost effect which could be given it was to neutralize the admission.⁴

§ 24. **Weight of admissions.**—A self-disserving declaration, deliberately made by a party, and clearly proved, is ordinarily, perhaps, the most satisfactory oral evidence. It has been frequently laid down that it is entitled to very great weight.⁵ It is to be observed, however, that this statement relates to the

M'Cord 464; *Newman v. Bradley*, 1 Dall. (Pa. St.) 240. But this rule can only be applied where the self-disserving portions of the declaration can be separated. Thus, where a negro says, "I was manumitted," it would not be possible to reject the statement and at the same time draw the implication from it that he was once a slave. *Fox v. Lambson*, 3 Halst. 255.

¹ Best on Ev., § 520.

² *Randle v. Blackburn*, 5 Taunt. 245; *Smith v. Blandy, Ry. & M.* 257.

³ 1 Phil. on Ev. (1849 ed.), 344. See 1 Starkie on Ev., star p. 46.

⁴ *Rice v. Withers*, 9 Wend. 138. See *Randle v. Blackburn*, 5 Taunt. 245.

⁵ *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Myers v. Brownell*, 2 Aikens (Vt.) 407, 16 Am. Dec. 729; *Tozer v. Hershey*, 15 Minn. 257; *Dreher v. Town of Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Martin v. Town of Algona*, 40 Iowa 390; *Greenawalt v. McEnelly*, 85 Pa. St. 352; 1 Greenl. on Ev., § 200.

force of an admission, about the deliberate making of which the mind has no question. But with reference to verbal admissions, there is grave danger that the witness may not have correctly understood what was said, or have forgotten the exact language; and the declarant may not have made his meaning clear, or have spoken in jest, or without real consideration of what he was saying. It is because of the uncertainty and liability to mistake upon these preliminary questions that courts and authors have been led to state that verbal admissions ought to be received with very great caution.¹ A few courts have sanctioned instructions which lay down the doctrine as it is ordinarily found in works on evidence,² but while such statements are correct, as abstract propositions, it must be said that in many jurisdictions such instructions would be regarded as an invasion of the jury's province.³ It is, however, entirely proper for the trial judge to direct the attention of the jury to the elements suggested, leaving it to determine what value, if any, it will place upon the testimony.⁴ There is a line of cases in which it is held that evidence of verbal statements and admissions made by a deceased person are not sufficient to establish a resulting trust, unless supported by strong corroborative evidence.⁵ A divorce will not be granted, without cor-

¹ *Rex v. Simons*, 6 C. & P. 540; *Earle v. Picken*, 5 C. & P. 542; *Law v. Merrialls*, 6 Wend. 268; *Hadden v. N. Y. Silk Mfg. Co.*, 1 Daly 388; *Myers v. Brownell*, 2 Aikens (Vt.) 407, 16 Am. Dec. 729; *Clarck v. Larkin*, 9 Iowa 391; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Dreher v. Town of Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Fry v. Stowers*, 92 Va. 13, 22 S. E. Rep. 500; *Greenl. on Ev.*, § 200; 1 *Phil. on Ev.* (1849 ed.), § 372. This is particularly true if the declaration is made in a casual conversation and to a disinterested person. *Haven v. Cole*, 67 Wis. 493, 30 N. W. Rep. 720; *Fiffeld v. Gaston*, 12 Iowa 218; *Wallace v. Berger*, 14 Iowa 183.

² See authorities cited in two notes immediately preceding.

³ *Davis v. Hardy*, 76 Ind. 272; *Unruh v. State*, 105 Ind. 117, 4 N. E. Rep. 453; *Castleman v. Sherry*, 42 Tex. 59; *Com. v. Galligan*, 113 Mass. 202; *Mauro v. Platt*, 62 Ill. 450.

⁴ See *Deal v. State*, 140 Ind. 354, 39 N. E. Rep. 930.

⁵ *Johnson v. Quarles*, 46 Mo. 423; *Ringo v. Richardson*, 53 Mo. 385; *Kennedy v. Kennedy*, 57 Mo. 73; *Davis v. Green*, 102 Mo. 170, 14 S. W. Rep. 876; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. Rep. 889. As to the weight of evidence of the admission of a deceased person, testified to by a witness who can not be contradicted, see *Coeler v. Abels*, 18 La. Ann. 617.

roboration, on the admission of one of the parties to the fact of adultery, because of the danger of collusion.¹

§ 25. **Practice as to receiving admissions.**—As an admission is itself substantive evidence, it is not necessary to fix time and place in interrogating a witness concerning it.² Although there is the right, within limits, where a witness is contradicted, to prove other declarations out of court consistent with his testimony, yet no right exists to break the force of an admission by showing the self-serving declarations of the party at any other time.³ The fact that the witness did not hear all of the statement will not prevent him from testifying to what he did hear.⁴ A witness should state the language of an admission, if possible; if not, the substance of it; he can not give merely his understanding of it.⁵ Proof may be made in rebuttal, where the facts warrant it, that the party making the statement was of weak intellect, so that the jury may know whether to attribute to the declaration the force of a deliberate admission.⁶

*Admissions by Persons Other than the Party Against Whom
They Are Introduced.*

§ 26. **Admissions by persons having joint interest—Joint and several obligation.**—According to the weight of authority, if one of two parties having a joint interest makes a self-dis-serving declaration, it is evidence against both. It is upon this ground that the declarations of joint obligors, or other persons having a joint interest, are received.⁷ There must,

¹ *Sheffield v. Sheffield*, 3 Tex. 79; 14 N. W. Rep. 671; *Logansport, etc., Mack v. Handy*, 39 La. Ann. 491, 2 Turnpike Co. v. Heil, 118 Ind. 135, 20 So. Rep. 181; *Whart. on Ev.*, § 483. N. E. Rep. 703; *State v. Hunt*, 137 Ind. 537, 37 N. E. Rep. 409.

² *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747.

³ *Hunt v. Roylance*, 11 Cush. 117 59 Am. Dec. 140; *Baxter v. Knowles*, 12 Allen 114; *Pickering v. Reynolds*, 119 Mass. 111; *Royal v. Chandler*, 79 Me. 265, 9 Atl. Rep. 615, 1 Am. St. Rep. 305; *Lyman v. Lull*, 20 Vt. 349; *Van Fleet v. Van Fleet*, 50 Mich. 1,

⁴ *Westmoreland v. State*, 45 Ga. 225; *Woolfolk v. State*, 85 Ga. 69, 11 S. E. Rep. 814; *State v. Covington*, 2 Bailey 569.

⁵ *Dennis v. Chapman*, 19 Ala. 29, 54 Am Dec. 186.

⁶ *Coats v. Elliott*, 23 Tex. 606.

⁷ *Whitcomb v. Whiting*, Doug. 652; *Armstrong v. Farrar*, 8 Mo. 627,

however, be evidence *de hors* the declaration to establish the joint relationship.¹ The doctrine of this section rests upon the ground that the interest of the parties being joint, the admission of one is the admission of all. The leading case upon the subject is *Whitcomb v. Whiting*,² decided by Lord Mansfield. In addition to the reason above suggested for the doctrine, it is further said in that case that one acts virtually as the agent for the other. In New York it is denied that there is such an agency between mere joint debtors as to make the declarations of one competent against the other,³ and even in jurisdictions where acquiescence is not yielded to the doctrine as laid down in New York, it must be held that the agency implied from the mere fact of the execution of a joint obligation is to be kept within very narrow confines. In an English case⁴ it was stated that the principle of the case of *Whitcomb v. Whiting*⁵ was not to be extended, and the court therefore denied the application of that case where an admission was made by one of the signers of a joint obligation after the death of the other obligor, for the reason that death had worked a severance.⁶ The limitations upon the writer's space will preclude an examination into the cases involved in the controversy engendered by *Whitcomb v. Whiting*⁷ relative to the power of a joint obligor to toll the statute of limitations against his co-obligor, by an admission of payment. The

and cases cited; *Hurst v. Robinson*, 13 Mo. 82, 53 Am. Dec. 134; *Costello v. Cave*, 2 Hill (S. Car.) 528, 27 Am. Dec. 404; *Bank of United States v. Lyman*, 1 Blatch. C. C. 297, 20 Vt. 666; *Clark v. Morrison*, 25 Pa. St. 453; *Ames, In re*, 51 Iowa 596, 2 N. W. Rep. 408; 1 Greenl. on Ev., § 176; *Whart. on Ev.*, § 1197, *et seq.* *Taylor on Ev.*, § 750; 1 Phil. on Ev., (1849 ed.) § 378. Where the principal and surety enter into a joint obligation, the admissions of the former are competent against the latter. *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231.

¹ *Hackley v. Patrick*, 3 Johns. 536; *Smith v. Ludlow*, 6 Johns. 267; *Gray v. Palmer*, 1 Esp. 135.

² *Whitcomb v. Whiting*, Doug. 652.

³ *Wallis v. Randall*, 81 N. Y. 164, and see *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Osgood v. Manhattan Co.*, 3 Cow. 612, 15 Am. Dec. 304; *Osborne v. Bell*, 62 Mich. 214, 28 N. W. Rep. 841.

⁴ *Atkins v. Tredgold*, 2 Bar. & Cress. 23.

⁵ *Whitcomb v. Whiting*, Doug. 652.

⁶ To the same effect *Lane v. Doty*, 4 Barb. 530.

⁷ *Whitcomb v. Whiting*, Doug. 652.

American authorities upon the subject will be found collected, to a large extent, in the note to that case in Charles H. Edson & Co.'s edition of Smith's Leading Cases.

§ 27. **A mere community of interest is not enough.**—If there is but a community of interest between two persons, the admission of one is not competent against the other. This rule has been applied as between tenants in common;¹ as between co-executors or co-administrators;² as between heirs or legatees;³ and as between the indorsers upon a note.⁴ The admission of a stockholder can not be received as against the corporation,⁵ and, *a fortiori*, the admission of a director of a private corporation,⁶ or a member of a public board, can not be shown.⁷

¹ *Dan v. Brown*, 4 Cow. 483, 45 Am. Dec. 395; *Lane v. Doty*, 4 Barb. 530; *Osgood v. Manhattan Co.*, 3 Cow. 612, 15 Am. Dec. 304.

² *Lane v. Doty*, 4 Barb. 530; *Cayuga County Bank v. Bennett*, 5 Hill 236; *Elwood v. Deifendorf*, 5 Barb. 398; *Hammon v. Huntley*, 4 Cow. 493; *James v. Hackley*, 16 Johns. 273; *McIntire v. Morris*, 14 Wend. 90; *Church v. Howard*, 79 N. Y. 415; *Whiton v. Snyder*, 88 N. Y. 299; *Davis v. Gallagher*, 124 N. Y. 487, 26 N. E. Rep. 1045; *Hathaway v. Haskell*, 9 Pick. 42.

³ *Hayes v. Burkam*, 67 Ind. 359; *Hauberger v. Root*, 6 Watts & S. 431; *Clark v. Morrison*, 25 Pa. St. 453; *Dillard v. Dillard*, 2 Strob. (S. Car.) 89; *Blakey's Heirs v. Blakey's Executrix*, 33 Ala. 611; *Forney v. Ferrell*, 4 W. Va. 729; *Ames, In re*, 51 Iowa 596, 2 N. W. Rep. 408; *Phelps v. Hartwell*, 1 Mass. 71; *Thompson v. Thompson*, 13 Ohio St. 356. *Contra*, *Beall v. Cunningham*, 1 B. Monr. 399; *Rogers v. Rogers*, 2 B. Monr. 324; *Brown v. Moore*, 6 Yerg. 272; *Saunders's Appeal*, 54 Conn. 108, 6 Atl. Rep. 193. In a suit on an administrator's bond, it was held that the admission of one distributee was not competent as

against his co-distributees. *Prewett v. Coopwood*, 30 Miss. 369.

⁴ *Slaymaker v. Gundacker's Executor*, 10 S. & R. 75.

⁵ *Osgood v. Manhattan Co.*, 3 Cow. 612, 15 Am. Dec. 304; *Fairfield Turnpike Co. v. Thorp*, 13 Conn. 173; *Polleys v. Ocean Ins. Co.*, 14 Me. 141. Although the law is otherwise in England, in this country the admissions of a parishioner, who is liable to be assessed for taxes, are not received. *Hartford Bank v. Hart*, 3 Day (Conn.) 491, 3 Am. Dec. 274; *Osgood v. Manhattan Co.*, 3 Cow. 612, 15 Am. Dec. 304; *Trustees of Village of Watertown v. Cowen*, 4 Paige 510, 27 Am. Dec. 80; *Whart. on Ev.*, § 1199.

⁶ *Pemigewasset Bank v. Rogers*, 18 N. H. 255; *Grayville, etc., Ry. Co. v. Burns*, 92 Ill. 302; *East River Bank v. Hoyt*, 41 Barb. 441. *Contra*, where the admission is made in and about a matter where the officer is called on to act. *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337.

⁷ *Walker v. Dunspaugh*, 20 N. Y. 170; *Davis v. Rochester*, 66 Hun 629, 21 N. Y. Supp. 215; *Yordy v. Marshall Co.*, 86 Iowa 340, 53 N. W. Rep. 298.

§ 28. **Admissions of co-conspirators.**—The subject of joint obligors, of which we have lately been treating, and of co-conspirators, upon superficial thought, seem almost as widely separated as the antipodes, but the same principle governs both. The word “conspire” is from the Latin word *conspiro*, meaning, to blow together, to breathe together. In both cases there is a joint agreement. The declarations and acts of co-conspirators are admitted on the theory that they have taken upon themselves, as a body, the attribute of individuality.¹ This subject is frequently treated of in works on evidence under the title *res gestæ*, and it is not improper to do so, for the declarations of a co-conspirator are not received except when they are a part of the *res gestæ*.² It is only those declarations which are uttered in the effort to aid or carry forward the design of the conspiracy, or which are a part of its active prosecution, that are admissible. Thus, upon a charge of murder, it was held incompetent to prove that a co-conspirator said, in response to a suggestion that he move his hay, so that the deceased could not steal it, “He will not be here next winter, and don’t you forget it.”³ Declarations as to past acts,⁴ or expressing merely the opinion or desire of the conspirator, are not competent.⁵ As such declarations are not admissible, it follows that acts not done in the execution of the conspiracy can not be shown. Thus, it can not be shown that a co-conspirator has fled,⁶ even to ac-

¹ 3 Greenl. on Ev., § 94; Ford v. State, 112 Ind. 373, 14 N. E. Rep. 241; State v. Johnson, 40 Kan. 286, 19 Pac. Rep. 749.

² 3 Greenl. on Ev., § 94.

³ State v. McGee, 81 Iowa 17, 46 N. W. Rep. 764. See Samples v. People, 121 Ill. 547, 13 N. E. Rep. 536. “Care, however, must be taken to distinguish between declarations, which are either acts in themselves purporting to advance the objects of the criminal enterprise, or which accompany and explain such acts, and those statements, whether written or oral, which

although made during the continuance of the plot, are in fact a mere narrative of the measures that have already been taken. These last statements are, as before explained, inadmissible.” Taylor on Evidence, § 593.

⁴ People v. Irwin, 77 Cal. 494, 20 Pac. Rep. 56; Walls v. State, 125 Ind. 400, 25 N. E. Rep. 457; People v. Murphy, 101 N. Y. 126, 4 N. E. Rep. 326, 54 Am. Rep. 661; State v. Johnson, 40 Kan. 286, 19 Pac. Rep. 749.

⁵ People v. Irwin, 77 Cal. 494, 20 Pac. Rep. 56.

⁶ People v. Lee Chuck, 78 Cal. 317,

count for the failure to call him as a witness,¹ or to corroborate the evidence of a state witness.² Where the purpose of the conspiracy is limited to the commission of a criminal act, the completion of the act marks the end of the criminal relationship, and, consequently, of the right to introduce the declarations of conspirators against their fellows. Where, however, the conspiracy also had for its object preventing suspicion from attaching to the defendant, or enabling him to escape justice, declarations made looking to such an end would still be competent.³

§ 29. **Proof of conspiracy.**—In the case of co-conspirators, as in the case of agency and also of partnership, one link in the chain of proof must be forged by evidence *aliunde*, and that is the fact of the joint undertaking; it would be a clear violation of principle to permit the declarations of co-conspirators to go in evidence to prove the very fact which alone could make such declarations competent.⁴ What the party himself says may, of course, be given in evidence as an admission. It is the usual practice to require *prima facie* evidence of the fact of conspiracy to be made in advance.⁵ Whether such a showing has been made is a question for the trial court, and its action will not

20 Pac. Rep. 719; *Jump v. State*, 27 Tex. App. 459, 11 S. W. Rep. 461.

¹ *People v. Sharp*, 107 N. Y. 427, 14 N. E. Rep. 319, 1 Am. St. Rep. 893.

² *People v. M'Quade*, 110 N. Y. 284, 18 N. E. Rep. 156.

³ *Miller v. Dayton*, 57 Iowa 423, 10 N. W. Rep. 814. See *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 87; *Scott v. State*, 30 Ala. 503.

⁴ *Ford v. State*, 112 Ind. 373, 14 N. E. Rep. 241; *Wharton on Ev.*, § 1206.

"The existence of a conspiracy is a fact, and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger that a

conspiracy existed against others, to which he was not a party, would clearly be inadmissible, and although the person making the assertion confessed that he was a party to it, this, on principles fully established, would not make the assertion evidence of the fact against strangers." 2 Starkie on Ev., star p. 235.

⁵ 2 Starkie on Ev., star p. 234; *United States v. Cole*, 5 McLean 513; *Com. v. Crowninshield*, 10 Pick. 497; *State v. George*, 8 Ired. 324, 49 Am. Dec. 392; *Goins v. State*, 46 Ohio 457, 21 N. E. Rep. 476; *State v. Weaver*, 57 Iowa 730, 11 N. W. Rep. 675; *State v. McGee*, 81 Iowa 17, 46 N. W. Rep. 764.

be reviewed in the absence of an abuse of discretion.¹ While it is the usual practice, as already stated, to refuse to permit the declarations of co-conspirators to be introduced in advance of evidence of the conspiracy, yet the court may, as a matter of discretion, permit evidence to go in of all that is said and done by the parties in carrying out the alleged conspiracy, and then it will become a question, upon the close of such testimony, whether, in view of all the acts, declarations and circumstances with which the party may be fairly charged, by concurrence or otherwise, enough has been shown to *prima facie* infect him with a conspiracy.² “If it be proved that the defendants pursued by their acts the same object, often by the same means,—one performing one part, and another another part of the same, so as to complete it,—with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object.”³

§ 30. **Declarations of predecessors in title.**—This subject will in part be considered under the title *res gestæ*.⁴ We are now about to deal with declarations which owe their admissibility to the fact that they are the self-disserving statements of persons through whom the party sought to be charged derails his title. If a person should make a declaration against interest concerning his right to certain property, and his right should subsequently be attacked, there would be no doubt as to the competency of such declaration as against him. It would seem to follow, therefore, that a grantee who purchased *caveat emptor* ought to be charged with his grantor's prior admis-

¹ *Goins v. State*, 46 Ohio 457, 21 N. E. Rep. 476. See *State v. McGee*, 81 Iowa 17, 46 N. W. Rep. 764. 106 Ind. 426, 7 N. E. Rep. 225; *Miller v. Dayton*, 57 Iowa 423, 10 N. W. Rep. 814; *State v. Ross*, 29 Mo. 32.

² *Spies v. People*, 122 Ill. 1, 12 N. E. Rep. 865, 3 Am. Rep. 320; *State v. Winner*, 17 Kan. 298; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. Rep. 832; *Riehl v. Evansville Foundry Asso.*, 104 Ind. Rep. 436. ³ *Greenl. on Ev.*, § 93; *United States v. Doyle*, 6 Sawyer 612; *The Mussel Slough Case*, 5 Fed. Rep. 680; *People v. Bentley*, 75 Cal. 407, 17 Pac. Rep. 436.

70, 3 N. E. Rep. 633; *Archer v. State*, ⁴ *Post*, § 289.

3—Ev.

sions, notwithstanding the transfer. This has been many times ruled as to realty, chattels and *choses in action*, including commercial paper transferred after maturity.¹ No attempt has been made to classify the cases cited in the note, as the rulings in all of them rest upon the same substantial principle. An effort has been made in the earlier pages of this work to show that admissions are primary evidence.² This consideration disposes of every objection to admitting the prior admissions of predecessors in title, unless a court should have the boldness to assert that the admissions of persons who stand in the ascending line of privity with the party are but mere hearsay declarations. As Messrs. Cowen and Hill say, in their learned notes to Phillips on Evidence:³ "The only doubt lies in the principle. Is the purchaser in privity with the seller? Does the vendee take subject to the vendor's defects of title?" In view of the strong array of English and American authority the subject would not merit further discussion except for the doubts cast upon the doctrine by the New York courts

¹ *Gibblehouse v. Strong*, 3 Rawle 174; *Brindle v. M'Ilvaine*, 10 Serg. & R. 282; *Kellogg v. Krauser*, 14 Serg. & R. 137, 16 Am. Dec. 480; *Reed v. Vancleve*, 27 N. J. L. 352, 72 Am. Dec. 369; *Dorsey v. Dorsey*, 3 Harr. & J. 410, 6 Am. Dec. 506; *Scott v. Coleman*, 5 Littell R. 349, 15 Am. Dec. 71; *Walthall v. Johnston*, 2 Call 275; *Woodruff v. Whittlesey*, Kirby 60; *Johnson v. Patterson*, 2 Hawks 183, 11 Am. Dec. 756; *Snelgrove v. Martin*, 2 McCord 241; *Shaw v. Broom*, 4 Dowl. & Ryl. 730; *Barough v. White*, 6 Dowl. & Ryl. 379; *Pocock v. Billing*, 2 Bing. 269; *Coster v. Symons*, 1 Carr. & P. 148; *Haddan v. Mills*, 4 Carr. & P. 486; *Peckham v. Potter*, 1 Carr. & P. 232; *Whart. on Ev.*, § 1156, and cases cited; 1 Greenl. on Ev., §§ 190, 191; *Taylor on Ev.*, §§ 790, 791; 3 Phil. on Ev., (1849 ed.) 265, *et seq.*

² *Ante*, § 18.

³ *Phillips on Evidence*, 3 vol. (1849 ed.), 288.

Gibblehouse v. Strong, 3 Rawle 437; *Hackett v. Amsden*, 59 Vt. 553, 8 Atl. Rep. 737; *Baker v. Haskell*, 47 N. H. 479, 93 Am. Dec. 455; *Davis v. Spooner*, 3 Pick. 284; *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Bond v. Fitzpatrick*, 4 Gray 89; *Flagg v. Mason*, 141 Mass. 64, 6 N. E. Rep. 702; *Magee v. Raiguel*, 64 Pa. St. 110; *Morgan v. McNeeley*, 126 Ind. 537, 26 N. E. Rep. 395; *Blount v. Riley*, 3 Ind. 471; *Stoner v. Ellis*, 6 Ind. 152; *Jacobs v. Callaghan*, 57 Mich. 11, 23 N. W. Rep. 454; *Williams v. Judy*, 3 Gil. (Ill.) 282, 44 Am. Dec. 699; *Cunningham v. Fuller*, 35 Neb. 58, 52 N. W. Rep. 836; *Taylor v. Hess*, 57 Minn. 96, 58 N. W. Rep. 824; *Robb v. Schmidt*, 35 Mo. 290; *Murray v. Oliver*, 18 Mo. 405; *Dickerson v. Chrisman*, 28 Mo. 134; *New York & Hav. Cigar Co. v. Bernheim*, 81 Ala. 138, 1 So. Rep. 470; *Frink v. Roe*, 70 Cal. 296, 7 Pac. Rep. 481; *Bassler v. Niesly*, 2 Serg. & R. 352; *Weidman v. Kohr*, 4 Serg. & R.

and the Supreme Court of the United States. The case of *Paige v. Cagwin*,¹ which was an over-due note case, fully established the doctrine in New York that such declarations were incompetent in cases involving the transfer of personal property and *choses in action*. In the attempt to distinguish between these classes of cases and real estate cases, the court reasons upon the subject in the following unsatisfactory way: "When a person becomes a purchaser of a *chose in action* or a chattel, for a valuable consideration, his rights are independent of his assignor and beyond his control. Although it may be necessary to found his title on the transfer, yet the mere proof of such transfer is evidence of his right. Personal property is frequently acquired by possession merely. Possession alone is, then, *prima facie* evidence of title, and the rights of the possessor do not necessarily depend on the title of the person by whom delivery was made."² It is upon this reasoning that the doctrine excluding the class of declarations under consideration in cases involving the transfer of personal property and *choses in action* rests in New York to this day,³ and the Supreme Court of the United States has adopted the same view.⁴ The case of *Paige v. Cagwin*⁵ contains also a suggestion which would exclude such declarations, except under exceptional circumstances, in real estate cases. That suggestion is that the old cases admitting such declarations as self-disserving were cases in which the privity between the parties was by blood or representation,

¹ *Paige v. Cagwin*, 7 Hill 361, 42 Am. Dec. 68.

² The dissenting opinion in this case rendered by Hopkins, Senator, contains a piece of reasoning unworthy of a judge of that great court. He says: "Can it be doubted that a written release or receipt duly proved to have been made before the note was transferred, would have put an end to it as a thing of value, or at least that it would have been *prima facie* evidence of payment or discharge? and yet a written receipt or admission of payment would have no

more effect than a verbal acknowledgment to discharge the note."

The learned judge evidently overlooked the fact that if a receipt was given as a part of the transaction of payment, the receipt would have been a part of the *res gestæ*.

³ *Flannery v. Van Tassel*, 127 N. Y. 631, 27 N. E. Rep. 393, and cases cited.

⁴ *Dodge v. Freedman's Trust Co.*, 93 U. S. 379.

⁵ *Paige v. Cagwin*, 7 Hill 361, 43 Am. Dec. 68.

as in the case of ancestor and heir, testator and executor, etc. The authorities do not warrant this view, and a distinction maintained on that ground, as the opinion cited from the Supreme Court of the United States clearly foreshadows, would exclude all of the vendor's declarations in many real estate cases, unless the declarations were a part of the *res gestæ*.¹ The difficulty with this latter day doctrine is that the authorities to the contrary have foreclosed discussion of the topic to such an extent that in most jurisdictions, under the rule of *stare decisis*, the question is not open to discussion. Returning now to what may be termed the general rule, it may be laid down, apart from exceptional cases hereafter noticed, that where a person must recover through the title of another, the admissions of the grantor, during his investiture of the title, are evidence against his grantee.² In other words, to use a somewhat figurative expression, if the subsequent holder is

¹ *Post*, § 289. See as to the New York doctrine concerning transfers of real estate, *Vrooman v. King*, 36 N. Y. 477; *Chadwick v. Fonner*, 69 N. Y. 404; *Savage v. Murphy*, 8 Bosw. 75.

² 1 Phil. on Ev., (1849 ed.) 394; *Taylor v. Ev.*, § 787; 1 Greenl. on Ev., § 189, *et seq.*; *Van Duyne v. Thayre*, 14 Wend. 233; *Smith v. Smith*, 3 Bing. (N. C.) 29, and see cases in the second note to this section. The admissions of an executor as to the circumstances attending the execution of the will are not competent when they affect the devisee. *Shailer v. Bumstead*, 99 Mass. 112; *Blakey's Heirs v. Blakey's Executrix*, 33 Ala. 611; *Ames, In re*, 51 Iowa 596, 2 N.W. Rep. 408. *Contra*, *Dennis v. Weekes*, 46 Ga. 514; *Peoples v. Stevens*, 8 Rich. (S. C.) 198, 64 Am. Dec. 750. See *post*, § 50. The fact of the insolvency of a testatrix at the time of her death can not be shown by a statement to that effect in a petition filed by her executor to make assets of the realty, the petition not having been acted on and it ap-

pearing that her heirs were claiming, not by descent, but by conveyance. *Osgood v. Manhattan Co.*, 3 Cow. 612, 15 Am. Dec. 304. The executor can not bind the heir by an admission where the real estate is not resorted to. *Mooers v. White*, 6 Johns. Ch. 360. The admission of an administrator being competent as against himself (*Faunce v. Gray*, 21 Pick. 243; *Eckert v. Triplett*, 48 Ind. 174) is competent against the administrator *de bonis non*. *Lashlee v. Jacobs*, 9 Humph. 718; *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735. A parent suing for the death of a child can not be charged with the mere admission of the child. *Louisville, etc., Ry. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. Rep. 714; *Ohio, etc., R. Co. v. Hammersley*, 28 Ind. 371; *Mutch v. Pierce*, 49 Wis. 231, 5 N. W. Rep. 486, 35 Am. Rep. 776. In all these cases it will be seen that the question of the admissibility of the evidence turns upon the consideration as to whether privity existed.

in a position where he must rely upon the strength of his predecessor's title, he may find that the strain put upon it by his effort to recover will cause it to part at a point where his predecessor's admission has mutilated it. It is to be remembered, however, that the doctrine of this section is not to be invoked for the purpose of overthrowing the title of a good faith purchaser for a valuable consideration, at the suit of the holder of a prior secret equity, for where equities are equal the holder of the legal title will prevail.¹ It is also necessary to distinguish in favor of the holder of commercial paper, who has purchased under circumstances entitling him to protection,² for, as observed by Mr. Justice Parke,³ "the right of a person holding by a good title is not to be cut down by the acknowledgment that he had no title." In a preceding section, some limitation is put upon the effect of admissions in cases where they conflict with the recording act or the statute of frauds.⁴

§ 31. Admissions not competent after purchaser's rights have attached.—In the absence of a conspiracy, and where the purchaser does not permit the seller to remain in possession of the property,⁵ the law is thoroughly settled that after the title has passed it does not lie with the seller, by his declarations, to impeach the purchaser's title.⁶ It has been denied that an owner

¹ "For equity will not disarm a purchaser but will assist him." *Basset v. Nosworthy*, Finch 102; *Story's Eq. Jur.* § 604. It may admit of question as to the extent that the holder of a non-negotiable *chose in action* can insist upon being protected against prior declarations of his assignor tending to establish an equitable right in another, in those jurisdictions which continue to treat non-negotiable *choses in action* as non-assignable except in equity. For some aid upon this subject consult the note to *Basset v. Nosworthy*, Finch 102, as reported in 2 *White and Tudor's Lead. Cas. in Eq.*, 4th Am. ed. from 4th Lon-

don ed., 1. Even the holder of the legal title to property is exposed to the prior admissions of the seller, if he buys with notice of an outstanding equity. *Little v. Dyer*, 138 Ill. 272, 27 N. E. Rep. 905, 32 Am. St. Rep. 140. See, in support of the text, 2 *Whart. on Ev.*, § 1163.

² *Barough v. White*, 4 B. & C. 327; *Beauchamp v. Parry*, 1 B. & Ad. 89; 1 *Phil. on Ev.* (1849 ed.) 394; 1 *Greenl. on Ev.*, § 190.

³ *Woolway v. Rowe*, 1 A. & E. 114.

⁴ *Ante*, § 17.

⁵ *Post*, §§ 288, 289.

⁶ *Padgett v. Lawrence*, 10 Paige's Ch. 170, 40 Am. Dec. 232; *Sprague v. Kneeland*, 12 Wend. 161; *Whitaker*

of land has power to prejudice by his declarations a purchaser under a judgment rendered before the declarations were made.¹ The contrary has been held in Massachusetts in the case of a mortgage,² and it would seem with the better reason, provided that the debtor had at the time such an interest in the property over and above the debt as to render his declaration self-dissevering. It has been held in Missouri that the declarations of the owner of a steamboat, made after it had been seized and ordered sold, could not be received.³ According to the weight of authority, an assignee who holds in trust for creditors is not liable to have his interest destroyed, or cut down, by the subsequent declarations of the assignor.⁴ Even the purchaser of a non-negotiable *chose in action*, although he gets no title at law, will be protected against the subsequent

v. Brown, 8 Wend. 490; *Bristol v. Dann*, 12 Wend. 142, 27 Am. Dec. 122; *Vrooman v. King*, 36 N. Y. 477; *Peck v. Yorks*, 47 Barb. 131; *Burk v. Hand*, 45 N. J. Eq. 166, 16 Atl. Rep. 693; *Beeckman v. Montgomery*, 1 McCarter (N. J. Eq.) 106, 80 Am. Dec. 229; *Souder v. Schechterly*, 91 Pa. St. 83; *McLaughlin v. McLaughlin*, 91 Pa. St. 462; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Kieth v. Kerr*, 17 Ind. 284; *Burkholder v. Casad*, 47 Ind. 418; *Campbell v. Coon*, 51 Ind. 76; *Proctor v. Cole*, 104 Ind. 373, 3 N. E. Rep. 106; *Burt v. McKinstry*, 4 Minn. 204, 77 Am. Dec. 507; *Derby v. Gallup*, 5 Minn. 119; *Blackman v. Wheaton*, 13 Minn. 326; *Adler v. Apt*, 30 Minn. 45, 14 N. W. Rep. 63; *Cleveland v. Davis*, 3 Mo. 331; *Enders v. Richards*, 33 Mo. 598; *Steward v. Thomas*, 35 Mo. 202; *State v. King*, 44 Mo. 238; *Weinrich v. Porter*, 47 Mo. 293; *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887, 62 N. W. Rep. 1112; *De France v. Howard*, 4 Iowa 524; *O'Neil v. Vanderburg*, 25 Iowa 104; *Garraby v. Green*, 32 Tex. 202; *Emmons v. Barton*, 109 Cal. 662,

42 Pac. Rep. 303; *Garlick v. Bowers*, 66 Cal. 122, 4 Pac. Rep. 1138; *Frink v. Roe*, (Cal.) 7 Pac. Rep. 481; *Josephi v. Furnish*, 27 Ore. 260, 41 Pac. Rep. 424; *Farmers' Loan and Trust Co. v. Montgomery*, 30 Neb. 33, 46 N. W. Rep. 214; *Koch v. Lyon*, 82 Mich. 513, 46 N. W. Rep. 779; *New York & Hav. Cigar Co. v. Bernheim*, 81 Ala. 138, 1 So. Rep. 470.

¹ *Padgett v. Lawrence*, 10 Paige's Ch. 170, 40 Am. Dec. 232. See Whart. on Ev., § 1162.

² *Flagg v. Mason*, 141 Mass. 64, 6 N. E. Rep. 702. And see *Martel v. Somers*, 26 Tex. 559.

³ *Renshaw v. Steamboat Pawnee*, 19 Mo. 532.

⁴ *Simpson v. Carleton*, 1 Allen 109, 79 Am. Dec. 707; *Heywood v. Reed*, 4 Gray 574; *Brock v. Schradsky*, 6 Colo. App. 402, 41 Pac. Rep. 512; *Carleton v. Baldwin*, 27 Tex. 572; *Josephi v. Furnish*, 27 Ore. 260, 41 Pac. Rep. 424; *Wynne v. Glidewell*, 17 Ind. 446; *Doe v. Moore*, 4 Blackf. 445; *Smith v. Simmes*, 1 Esp. 330. *Contra Koch v. Lyon*, 82 Mich. 513, 46 N. W. Rep. 779.

declarations of his assignor, and that, notwithstanding the fact that the latter is the plaintiff of record.¹

§ 32. **Statements of agent in making contract.**—“*Qui facit per alium facit per se*”—he who acts for another is regarded as acting for himself—so runs the maxim. It is unnecessary to multiply authority upon the plain proposition that if an agent has power to make a contract, his statements in the making of it are evidence to the same extent as if the principal were acting without the intervention of an agent. Such a statement is in the nature of original evidence, being an ultimate fact to be proved, and not an admission of some other fact. Even where authority to make a contract on behalf of another is wanting, a ratification of the contract, made with full knowledge of the facts, will attach to the contract whatever infection there was in the agency which brought it about.²

§ 33. **Admissions of agent or servant in matters where he is authorized to speak.**—It is frequently laid down that an agent's admission must be within the *res gestæ* to be competent. This statement is not entirely accurate, for there are agents who, by the express terms of their appointment, or by implication, from the nature of the service they render, are expected to speak for the principal, and where they do so speak it is the principal's voice.³ An illustration of an express delegation of authority to speak is found in a not infrequent occurrence in the affairs of life, that is, where a party, who receives an in-

¹ *Sargeant v. Sargeant*, 18 Vt. 371; *Green v. Boston, etc., R. Co.*, 128 Frear v. *Evertson*, 20 Johns. 142; *Doe v. Moore*, 4 Blackf. 445. See *Graham v. Lockhart*, 8 Ala. 9. *Green v. Boston, etc., R. Co.*, 128 Mass. 221, 35 Am. Rep. 370; *Burnside v. Grand Trunk Ry. Co.*, 47 N. H. 554, 93 Am. Dec. 474; *Wormsdorf v. Detroit City Ry. Co.*, 75 Mich. 472, 42 N. W. R. 1000, 13 Am. St. Rep. 453; § 1070; *Mechem on Agency*, § 178; *Story on Agency*, § 134.

² *Jones v. Jones*, 120 N. Y. 589, 24 N. E. Rep. 1016; *Whart. on Ev.*, § 1070; *Mechem on Agency*, § 178; *Story on Agency*, § 134. *Detroit City Ry. Co.*, 75 Mich. 472, 42 N. W. R. 1000, 13 Am. St. Rep. 453; *Wright v. Weimeister*, 87 Mich. 594, 49 N. W. Rep. 870; *Pray v. Farmers' Co-operative Creamery*, 89 Iowa 741, 56 N. W. Rep. 443; *McPherrin v. Jennings*, 66 Iowa 622, 24 N. W. Rep. 242; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. Rep. 876.

³ *Short v. Northern Pac. El. Co.*, 1 N. D. 159, 45 N. W. Rep. 706; *Illinois Cent. Ry. Co. v. Troustine*, 64 Miss. 834, 2 So. Rep. 255; *Morse v. Conn. Riv. R. R. Co.*, 6 Gray 450; *Lane v. Boston, etc., R. Co.*, 112 Mass. 455;

quiry from another, refers to a third person as authorized to answer on his behalf.¹ This authority is implied where statements are made by one person to another through the medium of an interpreter² or telephone operator.³ According to the weight of authority, the admission of a general agent, concerning the business entrusted to him, is competent, as his admission is regarded as equivalent to the acknowledgment of the principal.⁴ Since the authorities upon this proposition are not entirely harmonious,⁵ and since it is the policy of the law not to

¹ *Williams v. Innes*, 1 Camp. 364; *Daniel v. Pitt*, 1 Camp. 366, note; *Price v. Hollis*, 1 M. & S. 105; *Burt v. Palmer*, 5 Esp. N. P. C. 145; *Garnet v. Ball*, 3 Stark, N. P. C. 160; *Chapman v. Twit-chell*, 37 Me. 59, 58 Am. Dec. 773; *Craig v. Craig*, 3 Rawle (Pa.) 472, 24 Am. Dec. 390; *Over v. Schiffing*, 102 Ind. 191, 26 N. E. Rep. 91; *Gott v. Dinsmore*, 111 Mass. 45; *Green v. Boston, etc., R. Co.*, 128 Mass. 221, 35 Am. Rep. 370. This rule of evidence is also applicable to criminal cases. 1 Phil. on Ev., (1849 ed.) 386.

² *Com. v. Vose*, 157 Mass. 393, 32 N. E. Rep. 355; *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. Rep. 947; *Miller v. Lathrop*, 50 Minn. 91, 52 N. W. Rep. 274; *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901. The statements of a person made through an interpreter can not be shown except where such person is himself to be charged with them on the ground of an implied agency. *Schearer v. Harber*, 36 Ind. 536.

³ *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901. The fact that the voice is not identified goes only to the weight. *Wolfe v. Mo. Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. Rep. 49, 10 Am. St. Rep. 331. The doctrine of the text applies although the message is repeated by an operator in transit. *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901; *Oskamp v. Gadsden*, 35

Neb. 7, 52 N. W. Rep. 718, 37 Am. St. Rep. 428. Where the question was as to the knowledge of the defendant company that a defective car was about to be sent out on its road, it was held that evidence was competent that an employe engaged in making up the train telephoned to the general office for instructions relative to the matter, and that a voice which he did not recognize answered: "If she will hold together, send her off." In the view of the court the circumstances justified the jury in presuming that the order came from some one in authority. *Reed v. Burlington, etc., R. Co.*, 72 Iowa 166, 33 N. W. Rep. 451, 2 Am. St. Rep. 243.

⁴ *Burt v. Palmer*, 5 Esp. 145; *Palethorp v. Furnish*, 2 Esp. 511, note; 3 Phil. on Ev., (1849 ed.) 410; *Short v. Northern Pac. El. Co.*, 1 N. D. 159, 45 N. W. Rep. 706; *Lombard, etc., Ry. Co. v. Christian*, 124 Pa. St. 114, 16 Atl. Rep. 628; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Western Boatman's Benev. Asso. v. Kribben*, 48 Mo. 37; *Proctor v. Old Colony R. Co.*, 154 Mass. 251, 28 N. E. Rep. 13. The extra-judicial admissions of the general counsel of a railway company are not competent. *Ohio, etc., Ry. Co. v. Levy*, 134 Ind. 343, 32 N. E. Rep. 815.

⁵ *Wellington v. Boston & M. R. R.*, 158 Mass. 185, 33 N. E. Rep. 393, and cases cited in note 3, page 39.

open the door to the admissions of agents any further than has already been done,¹ it is clear that such admissions ought to be confined to statements of substantive facts,² and only admitted in cases where it is just under all the circumstances to regard the agent as the principal's *alter ego*. There are certain classes of agents who, by the implication of their employment, are expected to make statements to those who have business relations with them, and in such cases the information they thus afford is evidence against the principal. Within these classes are freight agents or baggage masters, who make statements, pursuant to inquiries, concerning lost freight or baggage,³ but they must be engaged in the performance of their duty in giving the information.⁴ The answer of a bookkeeper, in response to an inquiry by a customer as to the state of his account, would be competent.⁵ Where the question was whether defendants were partners in the banking business and the plaintiff applied to a joint agent of the defendant's at the bank to know whether there had been a change in the firm, and the agent answered that there had not been, it was held that the plaintiff was entitled to show this conversation in evidence.⁶ Where the issue was as to whether a policy of insurance had been renewed a second time, the court held that the plaintiff might testify that he applied to defendant's local agent for a certificate of the renewal of his policy, and that the agent said that he had previously delivered such certificate. The court put its ruling on the ground that although the deliv-

¹ Garth v. Howard, 8 Bing. 451, per Tindal, C. J. See Vogel v. Osborne, 32 Minn. 167, 20 N. W. Rep. 129.

² Van Dusen v. Letellier, 78 Mich. 492, 44 N. W. Rep. 572; Lombard, etc., R. Co. v. Christian, 124 Pa. St. 114, 16 Atl. Rep. 628.

³ Morse v. Conn. Riv. R. R. Co., 6 Gray 450; Lane v. Boston & A. R. Co., 112 Mass. 455; Burnside v. Grand Trunk Ry. Co., 47 N. H. 554, 93 Am. Dec. 474; Illinois Cent. R. Co. v. Troustine, 64 Miss. 834, 2 So. Rep. 255.

⁴ Boston & M. R. Co. v. Ordway, 140 Mass. 510, 5 N. E. Rep. 627.

⁵ Anvil Mining Co. v. Humble, 153 U. S. 540. But in the absence of special authority, the representations made by a bookkeeper to a mercantile agency would not be competent as he would have no authority to make them. Wakefield Rattan Co. v. Tappan, 70 Hun 405, 24 N. Y. Sup. 430.

⁶ Wright v. Weimeister, 87 Mich. 594, 49 N. W. Rep. 870.

ery of the renewal certificate was not essential, yet it was the duty of the agent to deliver the certificate, and, therefore, his statement in answer to plaintiff's request was competent.¹ But further illustrations need not be given, for the rule is plain that the answer of an agent concerning the facts of a transaction, of which inquiry was made of him, and upon which he had authority at the time to speak, is proper to go in evidence.² But such answer is only competent where it relates to a statement of a matter of fact. Thus, where a bank cashier, in answer to an inquiry as to the failure of the bank to collect certain notes, answered that the omission was the fault or negligence of the bank, his answer was excluded.³

§ 34. *Res gestæ* statements of agents and servants.—Subject to the exceptions already noted, of cases where the declaration is a part of a contract, and where the declaration was made pursuant to an express or implied authority to make the same, it may be laid down without qualification that if the declaration of an agent or servant is to go in evidence it must be *res gestæ*.⁴ Professor Greenleaf says:⁵ "The declaration of

¹ *Scott v. Home Insurance Co.*, 53 Barb. 25; *Happy v. Mosher*, 47 Barb. Wis. 238, 10 N. W. Rep. 387.

² *Pray v. Farmers' Co-operative Creamery*, 89 Iowa 741, 56 N. W. Rep. 443; *Short v. Northern Pac. El. Co.*, 1 N. D. 159, 45 N. W. Rep. 706; *McPherrin v. Jennings*, 66 Iowa 622, 24 N. W. Rep. 242.

³ *Plymouth County Bank v. Gilman*, 4 S. D. 265, 56 N. W. Rep. 892, 46 Am. St. Rep. 786.

⁴ *Packet Co. v. Clough*, 20 Wall. 528; *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99; *Burlington v. Calais*, 1 Vt. 385, 18 Am. Dec. 691; *Robinson v. Fitchburg R. R. Co.*, 7 Gray 92; *Burgess v. Wareham*, 7 Gray 345; *Demeritt v. Meserve*, 39 N. H. 521; *Thalhimer v. Brinckerhoff*, 4 Wend. 394, 21 Am. Dec. 155; *Luby v. Hudson Riv. R. Co.*, 17 N. Y. 131; *Fogg v. Child*, 13 Barb. 246; *Budlong v. Van Nostrand*, 24

501; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Oil City, etc., Co. v. Boundy*, 122 Pa. St. 449, 15 Atl. Rep. 865; *Haven v. Brown*, 7 Greenl. (Me.) 421, 22 Am. Dec. 208; *Franklin Bank v. Penn. D. & M. S. N. Co.*, 11 Gill & J. (Md.) 28, 33 Am. Dec. 687; *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 S. Rep. 844; *Home Pro. of N. A. v. Whidden*, 103 Ala. 203, 15 S. Rep. 567; *Latham v. Pledger*, 11 Tex. 439; *Sisson v. Cleveland, etc., R. R. Co.*, 14 Mich. 489, 90 Am. Dec. 252; *Golden v. Newbrand*, 52 Iowa 59, 2 N. W. Rep. 537, 35 Am. Rep. 257; *La Rue v. St. Anthony & D. El. Co.*, 3 S. D. 637, 54 N. W. Rep. 806, and cases cited; *Clunie v. Sacramento Lum. Co.*, 67 Cal. 313, 7 Pac. Rep. 708; *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744.

⁵ 1 Greenl. on Ev., § 113; *Peck v.*

an agent, to bind his principal, must be made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus*. Mr. Wharton points out, in his work on evidence,¹ that a servant moves within an orbit far more limited than that of agent, for the latter is authorized to exercise discretion. As a consequence it may be suggested, while not abating from the proposition that the declaration to be competent must be in the performance of the agent's duty, that it hardly seems reasonable to tie down as closely to time an agent's declaration as the declaration of a servant who was delegated to perform a mechanical duty.

§ 35. The mere admissions of agents or servants are not competent.²—The reason for this is that the agent is not at the time engaged in the executing of his contract of agency, and his statements under such circumstances are, therefore, in legal effect, the mere hearsay declarations of a third person. The admission by an agent of prior facts, amounting to a mere

Parchen, 52 Iowa 46, 2 N. Rep. 597. In *Anderson v. New York & F. S. S. Co.*, 47 Fed. Rep. 38, it became material to determine whether a winchman was deaf. It was claimed that the accident complained of had been occasioned by his failure to stop the machine on signal. It was held competent for the plaintiff to testify that the winchman had asked him, during the course of the service, to blow loud, as he was deaf. Where an embankment fell upon the plaintiff, and the foreman seeing the accident, exclaimed: "My God, I expected that!" the exclamation was held competent. *Elledge v. Nat'l City & O. Ry. Co.*, 100 Cal. 282, 34 Pac. Rep. 720, 852, 38 Am. St. Rep. 290. See *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. Rep. 1039. See, also, *Fairlie v. Hastings*, 10 Ves. 123; *Luby v. Hudson Riv. R. R. Co.*, 17 N. Y. 131; *Johnston v. Thompson*, 23 Hun 90;

Stiles v. Western R. Corp., 8 Met. 44, 12 Am. Dec. 486; *Memphis & C. Ry. Co. v. Maples*, 63 Ala. 601; *Lafayette & I. Ry. Co. v. Ehman*, 30 Ind. 83; *Hazleton v. Union Bank*, 32 Wis. 34; *Edmunds v. Curtis*, 8 Colo. 605, 9 Pac. Rep. 793; *Dodge v. Childs*, 38 Kan. 526, 16 Pac. Rep. 815.

¹Section 1182.

²"A close attention to this rule, which is of universal acceptance, will solve almost every difficulty. But an act done by an agent can not be varied, qualified or explained by his declarations which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he has done, or how he has done it, and his declaration is no part of the *res gestæ*." *Packet Co. v. Clough*, 20 Wall. 528.

narrative of a past transaction, is plainly within this rule of exclusion,¹ and, according to the weight of authority, the subsequent report of the facts made to the principal, by the agent, should be excluded, for the reason that as it is but a narrative of a past event, it is not *res gestæ*.² A different rule would obtain where it was made to appear that the report had been acted on by the principal,³ or had been promulgated by him.⁴

§ 36. **Proof of agency.**—Although, within the limits heretofore defined, an admission by an agent is evidence against his principal, yet one of the essential factors in the competency of such admission is the fact that the person making the statement was at the time an agent. It is therefore evident that to admit the evidence there must be proof of the fact of agency, *de hors* the admission. In other words, an agency can not be proved by the admission of the agent, when the fact of his agency is in

¹ As to a prior knowledge of defective conditions, see *Weeks v. Inhabitants of Needham*, 156 Mass. 289, 31 N. E. Rep. 8; *Treager v. Jackson Coal and Mining Co.*, 142 Ind. 164; 40 N. E. Rep. 907; *American Steamship Co. v. Landreth*, 102 Pa. St. 131, 48 Am. Rep. 196; *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. Rep. 641; *Worden v. Humeston & S. R. Co.*, 72 Iowa 201, 33 N. W. Rep. 629, and see in support of text generally, *Vicksburg & M. R. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. C. C. Rep. 118; *Elcox v. Hill*, 98 U. S. 218; *McKinnon v. Norcross*, 148 Mass. 533, 20 N. E. Rep. 183; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 34 N. E. Rep. 910, 36 Am. St. Rep. 710; *Burlington v. Calais*, 1 Vt. 385, 18 Am. Dec. 691; *Penn. R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *United States Express Co. v. Rawson*, 106 Ind. 215, 6 N. E. Rep. 337; *Walker v. Farmers' Ins. Co.*, 51 Iowa 679, 2 N. W. Rep. 583; *Home Pro. of N. A. v. Whidden*, 103 Ala. 203, 15 So. Rep. 567;

Adams v. Hannibal & St. Joseph R. Co., 74 Mo. 553, 41 Am. Rep. 333; *M'Indoe v. Clarke*, 57 Wis. 165, 15 N. W. Rep. 17; *Idaho For. Co. v. Fireman's Fund Ins. Co.*, 8 Utah 41, 29 Pac. Rep. 826; *Durkee v. Central Pac. Ry. Co.*, 69 Cal. 533, 58 Am. Rep. 562; *Beasley v. San Jose Fruit Pack. Co.*, 92 Cal. 388, 28 Pac. Rep. 485; *Gulf, etc., Ry. Co. v. York*, 74 Tex. 364, 12 S. W. Rep. 68.

² *Starkie on Ev.*, §34; *United States v. The Brig Burdett*, 9 Pet. 682; *Carroll v. East Tenn., etc., Ry. Co.*, 82 Ga. 452, 10 S. E. Rep. 163; *Langhorn v. Allnutt*, 4 Taunt. 511. *Contra* *Worms-dorf v. Detroit City Ry. Co.*, 75 Mich. 472, 42 N. W. Rep. 1000, 13 Am. St. Rep. 453. *Quere*, Would the statement to the principal be competent if made pursuant to a rule requiring a report?

³ *Carroll v. East Tenn., etc., Ry. Co.*, 82 Ga. 452, 10 S. E. Rep. 163; *Abbott's Tr. Ev.*, p. 51.

⁴ *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. Rep. 1.

question.¹ So, within the same principle, the acts of the person whose agency is in question can not be shown to prove the fact of agency, unless notice of his acts is expressly or impliedly traced home to the person whom it is sought to charge. The foundation of these doctrines is expressed in the maxim of the Civilians: "*Qui non potest donare non potest confiteri*"—he who is not able to give is not able to confirm.² There are cases which sanction the admission of declarations relative to authority, where they are made as a part of the *res gestæ*,³ but it is believed that these declarations are admissible rather to prove the fact that the person was acting pursuant to his authority, that is, as an agent, where that fact is in issue, than as proof of the substantive fact that he was an agent.

§ 37. **Admissions of agents of corporations.**—No special discussion of this sub-head is necessary. It only remains to say that the authority of agents of corporations to make declarations and admissions stands upon the same footing as the authority of agents of natural persons.⁴

§ 38. **Admissions of attorneys.**—Admissions of attorneys may be classified into judicial and extra-judicial admissions. In an English case,⁵ Lord Ellenborough said: "If a fact is admitted by the attorney on the record, with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose, and his client will be bound by the ad-

¹2 Whart. on Ev., § 1183 and cases cited; Mechem on Agency, and cases cited; Scott v. Crane, 1 Conn. 255; Plumsted v. Rudebagh, 1 Yeates 502; James v. Stookey, 1 Wash. C. C. 330; Rowell v. Klein, 44 Ind. 290, 15 Am. Rep. 235; La Rose v. Logansport Nat. Bank, 102 Ind. 332, 1 N. E. Rep. 805; Whitescarver v. Bonney, 9 Iowa 480; Proctor v. Tows, 115 Ill. 138, 3 N. Rep. 569; Texas L. & L. Co. v. Watson, (Tex. Civ. App.) 22 S. W. Rep. 873; Maester v. Abraham, 1 Esp. N. P. C. 375.

²This maxim, although applicable to nearly every case of agency, it will

be borne in mind is not quoted with reference to the contractual powers of agents, a subject with which we are not dealing. See Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380, and cases cited.

³Willey v. City of Portsmouth, 64 N. H. 214, 9 Atl. Rep. 220; Marion v. Chicago, etc., Ry. Co., 64 Iowa 568, 21 N. W. Rep. 86. See Columbus, etc., Ry. Co. v. Powell, 40 Ind. 37.

⁴Taylor on Priv. Corporations, § 210; Angell and Ames on Corporations, § 309.

⁵Young v. Wright, 1 Camp. 139.

mission." But it is not to be inferred that it is necessary that such admission should be entered of record; for the purposes of the particular trial, at least, a formal admission, although not reduced to writing, is as binding as though it was entered upon the minutes of the court.¹ An admission may be made by an attorney, for the purposes of trial, in advance, provided that he has been retained.² But mere informal statements made by an attorney, even upon the trial, are not evidence, and will not relieve from the burden of proof.³ Formal admissions are evidence upon a subsequent trial;⁴ they can not be withdrawn, unless the court in the exercise of a sound discretion relieves the party from them.⁵ Even a stranger to the cause may show in evidence an admission, where it appears from the circumstances that it was an admission, as distinguished from a mere concession.⁶ This suggests the fact that there are a class of statements which lie about the boundary line between admissions and concessions, the competency of which upon a subsequent trial is difficult to determine. Sometimes a question of this character can be determined as one of law, but perhaps more often it is necessary to submit it to the jury with appropriate instructions.⁷ Where an attorney makes a formal

¹ *Smith v. Whittier*, 95 Cal. 279, 30 Pac. Rep. 529; *People v. Stephens*, 52 N. Y. 306.

² *Marshall v. Cliff*, 4 Camp. 133; 1 Greenl. on Ev., § 186.

³ *Lake Erie & W. Ry. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. Rep. 470. See *Oscanyan v. Arms Co.*, 103 U. S. 261. "It is clear that whatever the attorney says in the course of conversation is not evidence in the cause." *Young v. Wright*, 1 Camp. 139.

⁴ *Elton v. Larkins*, 1 M. & Rob. 196; *Langley v. Oxford*, 1 M. & Wel. 508.

⁵ 1 Greenleaf on Ev., §§ 186, 206; *Holley v. Young*, 68 Me. 215, 28 Am. Rep. 40. See *Voisin v. Conn. Ins. Co.*, 67 Hun 365, 22 N. Y. Supp. 348. An admission made to obviate a continuance is not evidence upon a sub-

sequent trial. *Hudson v. Applegate*, 87 Iowa 605, 54 N. W. Rep. 462.

⁶ See 2 Whart. on Ev., § 1185.

⁷ In *Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163, *Brewer, J.*, speaking for the court said: "It is doubtless often true that during the progress of a trial, and to hasten it, counsel waive the production by the opposite party of formal proof of some fact, intending to rest their case on some other matter; and this which is done for the mere purpose of that trial alone, and for the sake of facilitating it, is not to be considered as a formal admission of the fact, binding in all subsequent progress of the case. But whether the consent or admission or waiver is to be considered as made for the pur-

demand of the opposite party for performance, there is no reason why the statement, made on his client's behalf, should not go in evidence.¹

§ 39. **Admissions of public officers.**—The declarations of public officers, when offered in cases where the public in its aggregate capacity is a party, rest upon the same ground as the declarations of other agents. There is a limited class of cases in which it is a part of their duty to make statements in response to inquiries, and in which it is the expectation of the law-making power that the mutual rights of the public, and of the individual dealing with it, shall be affected thereby. In these cases, and in cases where a declaration may be necessary to be introduced in order to explain or illustrate a litigated

pose of that trial only, or as a general admission, is ordinarily a question of fact to be determined by the jury, and so in this case the court placed it. It is true that sometimes the waiver or admission may be so obviously intended for that trial alone that the court may properly so instruct the jury, and it may also be so obviously intended as a general admission that the court may instruct the jury to treat it as such; as, for instance, where the parties sign an agreed statement of facts. [See, however, *Elting v. Scott*, 2 Johns. 156.] But perhaps more often, especially in reference to oral admissions, it is uncertain whether they were intended as general admissions, like admissions in a pleading by which the party intends to stand at all times, or as a mere waiver of proof for the purposes of facilitating the pending trial. There the tribunal to determine what was the import and intent of the admission is the jury before which the case is then pending for hearing. It is not always easy to determine as to any particular admis-

sion upon which side of the line it belongs, yet the difficulty is not in the rule itself, but in its application to the particular case.

¹"The maxim '*qui facit per alium facit per se*,' applies as well to acts done or statements made by an attorney at law as to any other agent. The act of a party, done by his agent, may always be proved against him, if material. An attorney or agent employed to present and collect a claim is impliedly authorized to state to the debtor what the claim is. The plaintiff could not have expected that his attorney would collect her claim from the defendant on demand, without stating the nature and particulars of it, so that the defendant could understand it, and make investigation as to its validity. It was as much a part of his duty to state, as nearly as possible, the precise place in the building where the accident happened, if asked, as to state in what town or state the plaintiff was when she fell." *Loomis v. New York & H. & H. Ry. Co.*, 159 Mass. 39, 34 N. E. Rep. 82.

act, the declarations of public officers are competent. Pure narratives or admissions should be excluded.¹

§ 40. **Admissions of partners.**—No question can exist as to the competency of an admission of the fact of partnership as against the declarant.² It is equally plain that such admission is not competent as against the other party sought to be bound.³ “The law as to partnership,” said Lord Wensleydale,⁴ “is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view.” This observation is particularly pertinent in so far as it relates to admissions by partners concerning past transactions. A partner’s declarations or acts are not competent to bring a prior transaction within the partnership with which it had no connection, for this would be to render the partnership helpless against the fraud and unlawful acts of the declarant.⁵ With reference,

¹ *Yordy v. Marshall County*, 86 Iowa 340, 53 N. W. Rep. 298; *Nolley v. Callaway County Court*, 11 Mo. 447; *Blackmore v. Boardman*, 28 Mo. 420; 1 *Dillon on Municipal Corporations*, § 237, note.

² *Whitney v. Sterling*, 14 Johns. 215; *Corps v. Robinson*, 2 Wash. C. C. 388; *McPherson v. Rathbone*, 7 Wend. 216; *Kirby v. Hewitt*, 26 Barb. 607; *Vannoy v. Klein*, 122 Ind. 416, 23 N. E. Rep. 526.

³ *Corps v. Robinson*, 2 Wash. C. C. 388; *Whitney v. Ferris*, 10 John. 66; *McPherson v. Rathbone*, 7 Wend. 216; *Kirby v. Hewitt*, 26 Barb. 607; *Butte Hardware Co. v. Wallace*, 59 Conn. 336, 22 Atl. Rep. 330; *Young v. Smith*, 25 Mo. 341; *Clark v. Huffaker*, 26 Mo. 264; *Brown v. Rains*, 53 Iowa 81, 4 N. W. Rep. 867. In *Sheehan v. Fleetham*, 66 Hun 628, 21 N. Y. Supp. 128, it was held that a declaration as to the existence of a partnership by a person claiming to be a partner in

making a report to a mercantile agency, was inadmissible.

⁴ *Wheatcroft v. Hickman*, 9 C. B. N. S. 47, 8 H. of L. C. 268.

⁵ *Thorn v. Smith*, 21 Wend. 365; *Union Nat. Bank v. Underhill*, 102 N. Y. 336, 7 N. E. Rep. 293; *Uhlen v. Browning*, 28 N. J. L. 79; *Kaiser v. Fendrick*, 98 Pa. St. 528; *Heffron v. Hanaford*, 40 Mich. 305; *Hickman v. Reineking*, 6 Blackf. 387; *Boor v. Lowery*, 103 Ind. 468, 3 N. E. Rep. 151, 53 Am. Rep. 519; *Williams v. Lewis*, 115 Ind. 45, 17 N. E. Rep. 262, 7 Am. St. Rep. 403; *Slipp v. Hartley*, 50 Minn. 118, 52 N. W. Rep. 386, 36 Am. St. Rep. 629; *Hahn v. St. Clair*, etc., Ins. Co., 50 Ill. 456; *Blaker v. Sands*, 29 Kan. 551. In *Boor v. Lowery*, 103 Ind. 468, 53 Am. Rep. 519, it was held that the admission of one member of a firm of physicians, as to the manner in which he had treated a patient, was not competent, as against his co-partner.

however, to the contractual power of a partner, it is measured, as to one dealing with him in good faith as a representative of the firm, by the apparent scope of the business.¹ But this distinction is only suggested for the sake of clearness; it does not concern us now. The admissions of a partner are only competent when made in the execution of the affairs of the firm.²

§ 41. Admissions of partners after voluntary dissolution.—By the failure to give the proper notice of the fact of dissolution, the partners may be able to exercise, as to third persons without notice of the fact, a greater measure of contractual authority than they are lawfully authorized to exercise; but, aside from this, with the dissolution of the partnership comes the surcease of the agency, for most purposes, at least. As to admissions, the power to make them is extinguished, except that, according to some of the authorities, such admissions may be made concerning such past matters as are purely incidental to the closing up of the business affairs of the partnership. As laid down by the supreme court of Maine:³ “The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle and pay those before created.” In *Wood v. Braddick*,⁴ Lord Mansfield says: “Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred since their separation; but the power of partners with respect

¹ *Griswold v. Haven*, 25 N. Y. 595, Rep. 151, 53 Am. Rep. 519; *Williams v. Lewis*, 115 Ind. 45, 17 N. E. Rep. 262, 782 Am. Dec. 380, and cases cited; *Sweet v. Wood*, 18 R. I. 386, 28 Atl. Am. St. Rep. 403; *Heffron v. Hanaford*, 335; *Deckard v. Case*, 5 Watts 22, 30 40 Mich. 305; *Hahn v. St. Clair, etc.*, Am. Dec. 287; *Edwards v. Dillon*, 147 Ins. Co., 50 Ill. 456; *Avery v. Rowell*, Ill. 14, 35 N. E. Rep. 135, 37 Am. St. 59 Wis. 82, 17 N. W. Rep. 875; *McLeod v. Bullard*, 84 N. Car. 515; *Blaker v. Sands*, 29 Kan. 551; *Woodruff v. Scaife*, 83 Ala. 152, 3 So. Rep. 311; *Western Stage Co. v. Walker*, 2 Iowa 504, 65 Am. Dec. 789.

² *Winchester v. Creary*, 116 U. S. 161, 6 Sup. Ct. Rep. 369; *Fickett v. Swift*, 41 Me. 65, 66 Am. Dec. 214; *Bound v. Lathrop*, 4 Conn. 336, 10 Am. Dec. 147; *Corps v. Robinson*, 2 Wash. C. C. 388; *Boor v. Lowery*, 103 Ind. 468, 3 N. E.

³ *Darling v. March*, 22 Me. 184.

⁴ *Wood v. Braddick*, 1 Taunt. 104.

to rights created, pending the partnership, remains after the dissolution." So far as this proposition relates to the closing up of the affairs of the firm, apart from the giving of new obligations, or the admission of the existence of subsisting ones, no substantial question exists among the authorities.¹ But in the same year that *Wood v. Braddick*² was decided, it was held in New York, in the case of *Hackley v. Patrick*,³ that the voluntary dissolution of a partnership so far put an end to the agency as to prevent a partner from acknowledging an obligation. Although neither of these cases was especially well considered, yet they stand, as it were, at the forks from which two divergent lines of authority spring. In the one class of cases the admissibility of the evidence is put on the ground that the agency still continues as to past transactions, for at least the purpose of making such incidental admissions as the closing up of the partnership involves, while the other line of cases denies to the partners upon dissolution the power to admit the existence of obligations, for the reason that the power to make an admission which will furnish the evidence whereby an obligation is saddled upon the partnership is the practical equivalent of the creation of a new obligation. In an Ohio case⁴ it was held that while a statement showing the condition of the account between the firm and a third person, or showing a balance in the latter's favor, if sent by a partner after dissolution, would not alone be evidence as an admission, yet such statement would be competent if coupled with evidence as to the existence of the unsettled account at the time of the dissolution and of the fact that the statement was made by the partner as a part of the business of closing up the affairs of

¹ In *Butchart v. Dresser*, 4 De Gex, M. & G. 542, the court said: "Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership for partnership purposes as he had during the continuance of the partnership. This must

necessarily be so. If it were not, at the instant of the dissolution it would be necessary to apply to this court for a receiver in every case, although the partners did not differ on any one item in the account."

² *Wood v. Braddick*, 1 Taunt. 104.

³ *Hackley v. Patrick*, 3 Johns. 536.

⁴ *Feighley v. Whitaker*, 22 Ohio St. 606, 10 Am. Rep. 778.

the firm. With the further qualification that the declaration must always be self-disserving, it is believed that where the declarations arrange themselves within the limitations of the case last cited, the weight of reason, and perhaps of authority, is in favor of the admissibility of the evidence.¹

§ 42. **Admissions of surviving partners.**—Upon the death of a member of a firm composed of two partners, the survivor, because of his personal obligation to pay the debts, and his right to obtain his own equity in the residue, succeeds to the entire legal title of the partnership property.² Although accountable in equity, he is not a trustee in the ordinary sense, for he does not join the deceased's personal representative as *cestui que trust* in suits brought, and he may be sued alone. So, the right of set-off, according to the great weight of authority, is determined precisely as if he held the property in his own right.³ Under these circumstances, at least in jurisdictions where judgments against the survivor are treated, as against the representatives of the decedent, as *res inter alios acta*, and not as *prima facie* evidence, it would seem quite plain that in a suit where he was defendant, his admissions subsequent to the dissolution would be competent. The only objection which could be urged against such a doctrine would be that it might lead to the dissipation of the assets, but the fact that the declaration was self-disserving would sufficiently protect against that possibility. As death works not only a dissolution of the partnership, but works a severance of the joint obligations of the firm,⁴ the authorities with even more unanimity than in the case of a voluntary dissolution, deny to

¹The authorities, *pro* and *con*, relative to this proposition are collected, and the shades of discrimination noted, in the learned work of Mr. Bates on Partnership, §§ 700, 701. As the limits of this undertaking will not permit a thorough discussion of the various cases upon the comparatively minor point under consideration, it is deemed better to refer the reader to a work on partnership.

²*Russell v. McCall*, 141 N. Y. 437, 38 Am. St. Rep. 807; 36 N. E. Rep. 498; Bates on Part., § 718.

³Bates on Part., § 722.

⁴*Getty v. Binsse*, 49 N. Y. 385, 10 Am. Rep. 379; *Lane v. Doty*, 4 Barb. 530, and cases cited; *Ladd v. Griswold*, 4 Gilm. (Ill.) 25, 46 Am. Dec. 443; *Towers v. Moor*, 2 Vern. 98; *Atkins v. Tredgold*, 2 Bar. & Cres. 23; Bates on Part., § 746.

the survivor the right to create new obligations, or to change the form of old ones.¹

§ 43. **Admissions of principals as against sureties.**—Where the admission of a principal involves his own conduct, such admission may in many instances be shown as against the surety. In cases where a surety has signed an official bond, conditioned upon the principal faithfully performing his duties, and it is made his duty to keep correct books, or make accurate reports, there is no difficulty in assigning a sufficient reason for the reception of the books or reports in evidence as against the surety, because the latter has contracted that they shall be correct.² It is evident, however, that under the decided cases evidence of the principal's declarations must be put on a somewhat broader basis. Dallas, C. J., suggests,³ that the declarations of the principal may bind in the same sense that those of an agent would, both being within the scope, and in the carrying out, of the business. A number of American cases assign this as the ground of admitting the evidence.⁴ In fact the proposition that the declaration is evidence if it is *res gestæ* is one of such familiarity as to be current coin in legal literature.⁵ And it would seem that such expression is substantially accurate as it only admits declarations accompanying litigated acts,⁶ and statements made by the principal pursuant to requests for information which it was his duty to an-

¹ Bates on Part., § 727.

² McKim v. Blake, 139 Mass. 593, 2 N. E. Rep. 157; Board of Supervisors of Tompkins County v. Bristol, 99 N. Y. 316, 1 N. E. Rep. 878; State v. Newton, 33 Ark. 276. See Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Father Matthew, etc., Society v. Fitzwilliams, 84 Mo. 406; Prosser v. Hartley, 35 Minn. 340, 29 N. W. Rep. 156; Bissell v. Saxton, 66 N. Y. 55; Com. v. Tate, 89 Ky. 587, 13 S. W. Rep. 113; Agricultural Ins. Co. v. Keeler, 44 Conn. 161; Bank of Brighton v. Smith, 12 Allen 243, 90 Am. Dec. 144; Singer Mfg. Co. v. Coon, 9

Misc. 465, 30 N. Y. Supp. 232; Goss v. Watlington, 3 Brod. & B. 132; Whitnash v. George, 8 Barn. & Cres. 556.

³ Goss v. Watlington, 3 Brod. & B. 132.

⁴ Respublica v. Davis, 3 Yeates 128, 2 Am. Dec. 366; Bernard v. Com., 4 Litt. 148; Pendleton v. Bank of Kentucky, 1 T. B. Monroe 171.

⁵ 1 Greenl. on Ev., § 187; Wharton on Ev., § 1212.

⁶ Board of Supervisors of Tompkins County v. Bristol, 99 N. Y. 316, 1 N. E. Rep. 878, and cases cited; Hotchkiss v. Lyon, 2 Blackf. 222; Placer Co. v. Dickerson, 45 Cal. 12.

swer in the discharge of the duties of his position,¹ and since it excludes all mere voluntary statements and admissions.² In cases where the declaration of a principal is admitted as against the surety, it is not conclusive.³ Suretyship undertakings may sometimes take the form of joint obligations,⁴ or the principal may be dead.⁵ These considerations may serve to broaden the scope of evidence concerning admissions, but these subjects receive attention elsewhere.

§ 44. Receipts and oral acknowledgments of others as admissions.—It is clear that a third person, to whom performance is agreed to be made, may by receipt or admission made at the time of performance, acknowledge the same, and that such receipt or acknowledgment may be shown without further suppletory proof.⁶ This doctrine may be fairly rested on the ground of agency. Receipts taken by trustees have sometimes been admitted without calling the persons who executed them, and such a course might be defended as within the spirit of

¹ *Placer Co. v. Dickerson*, 45 Cal. 12; *Shelby v. Governor*, 2 Blackf. 289; *Pendleton v. Bank of Kentucky*, 1 T. B. Monroe 171; *Governor v. Twitty*, 1 Dev. 153; *Chairman of Washington Co. Court v. Harramond*, 4 Hawks 339; *Singer Mfg. Co. v. Coon*, 9 Misc. 465, 30 N. Y. Supp. 232. The declarations of a bank cashier, made while the directors are examining his accounts, are competent. *Bank of Brighton v. Smith*, 12 Allen 243.

² Where an accounting was made by a principal under a compulsory court proceeding, long after his employment had ceased, his statement was held inadmissible. *Douglass v. Howland*, 24 Wend. 35. So, in a suit on a constable's bond, his admission after going out of office was excluded. *Dennis v. Chapman*, 19 Ala. 29, 54 Am. Dec. 186. See *Singer Mfg. Co. v. Coon*, 9 Misc. 465, 30 N. Y. Supp. 232; *Foxcroft v. Nevens*, 4 Greenl. 72; *Hotchkiss v.*

Lyon, 2 Blackf. 222; *Republica v. Davis*, 3 Yeates 128, 2 Am. Dec. 366.

³ *Town of Union v. Bermes*, 44 N. J. L. 269, 43 Am. Rep. 369; *Bissell v. Saxton*, 66 N. Y. 55; *Thomas v. Blake*, 126 Mass. 320; *McShane v. Howard Bank*, 73 Md. 135, 20 Atl. Rep. 776; *Ohning v. City of Evansville*, 66 Ind. 59 (overruling *State v. Grammer*, 29 Ind. 530); *Crawford v. Turk*, 24 Gratt. 176 (overruling *Baker v. Preston*, Gilmer (Va.) 235; *Board of Supervisors of Jefferson Co. v. Jones*, 19 Wis. 51; *Van Sickel v. County of Buffalo*, 13 Neb. 103, 42 Am. Rep. 753; *State v. Rhoades*, 6 Nev. 352.

⁴ *Ante*, § 26.

⁵ *Post*, § 154, *et seq.*

⁶ *Fenner v. Lewis*, 10 John. 38; *Sherman v. Crosby*, 11 John. 70; and see *Prather v. Johnson*, 3 Har. & John. 487; *Carroll v. Tyler*, 2 Harr. & Gill 54; *Shearman v. Akins*, 4 Pick. 283.

the above rule.¹ There are a few cases where bare admissions made after performance have been held competent.² The most that can be said of these declarations is that they were self-disserving, but that alone would not, upon principle, authorize their admission,³ and the doctrine of these cases finds opposition in the doctrine that the admissions of principals as to past occurrences are not competent as against their sureties.

§ 45. **Admissions of trustees.**—It is difficult to discuss this subject satisfactorily. Many of the cases which are looked upon as precedents were decided at a time when courts of law treated a trustee as the absolute owner of the subject-matter of his trust. Moreover, as we shall see in a subsequent section, the English courts attach great importance to the fact that a trustee is a party, in determining as to the competency of his admissions. Voicing the words of the authorities as they are found, it may be laid down that the admissions of trustees, who hold the legal title to property, and who are never presumed to make admissions adverse to the interests of those for whom they act, are competent.⁴ The American courts have broken away from the hard and fast rule of the English courts, in cases where admissions are made by persons who are made plaintiffs to answer some technical requirement, as where suit is brought in the name of the assignor of a *chose in action*,⁵ and in Alabama the doctrine concerning trustees'

¹ *Shearman v. Akins*, 4 Pick. 283.

² *Holladay v. Littlepage*, 2 Munf. 316; *Meade v. McDowell*, 5 Binn. 195.

³ See *Cluggage's Lessee v. Swan*, 4 Binn. 150, 5 Am. Dec. 400; 3 vol. Phil. on Ev., Cowen and Hill's notes (1849 ed.) 259, 260, 263.

⁴ *Helm v. Steele*, 3 Humph. 472; *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Neill v. Keese*, 5 Tex. 23, 51 Am. Dec. 746; *Bauerman v. Radenias*, 7 T. R. 659; *Lench v. Lench*, 10 Ves. 511; *Spargo v. Brown*, 9 Barn. & C. 935; *Gibson v.*

Winter, 5 Barn. & Adol. 96. But see *Buller's N. P.* 237.

⁵ *Sargeant v. Sargeant*, 18 Vt. 371; *Webb v. Steele*, 13 N. H. 230; *Lewis v. Long*, 3 Munf. (Va.) 14; *Frear v. Evertson*, 20 Johns. 142. The English courts reach the same end, but the means adopted is a resort to chancery to prevent the assignor from doing any act to the prejudice of his assignment. *Payne v. Rogers*, Doug. 407; *Legh v. Legh*, 1 B. & P. 447; *Frear v. Evertson*, 20 Johns. 142; *Lewis v. Long*, 3 Munf. (Va.) 136; *Morton v. Morton*, 13 S. & R. 107; *Whart. on Ev.*, § 1207.

admissions has been repudiated.¹ Upon the present state of the American authorities, it is plain that the English rule concerning the admissions of parties to the record will be broken over again, in order to prevent an injustice to a *cestui que trust*, and it therefore becomes pertinent to inquire as to when the declarations of trustees ought to go in evidence. It is believed that the New York Court of Appeals² took a position which is applicable to nearly all trustees in ruling that a guardian occupies a position analagous to that of an agent of an adult, and that as a consequence the declarations of a guardian must be put on a footing with those of an agent.³ The effect of this ruling is not to limit the contractual and dispositive power of a guardian, or to exclude his *res gestæ* declarations; and to hold to the same rule as to other trustees could do no injustice to third parties, while it would protect *cestuis que trust* from the consequence of the inconsiderate admissions of their representatives, who do not usually have at stake a degree of self-interest sufficient to make them entirely prudent in their statements. The only possible exception to the rule would be as to those classes of trustees which in strictness are not agents,

Graham v. Lockhart, 8 Ala. 9.

² Buffalo, etc., Co. v. Knights Templar, etc., Asso., 126 N. Y. 450, 27 N. E. Rep. 942, 22 Am. St. Rep. 839.

³ The court held that in one respect the ward had an advantage over a principal, for the reason that the court would relieve the ward from the consequences of the guardian's prejudicial conduct. It is maintained by many authorities that a court will not found a judgment or decree against a minor on the admissions of the guardian who defends for him. Wrottesley v. Bendish, 3 P. Wms. 235; Bank of United States v. Ritchie, 8 Pet. 128; Mills v. Dennis, 3 Johns. Ch. 367; Buffalo, etc., Co. v. Knights Templar, etc., Asso., 126 N. Y. 450, 27 N. E. Rep. 942, 22 Am. St. Rep. 839; Massie v. Donaldson, 8 Ohio 377; Long v. Mulford,

17 Ohio St. 484, 93 Am. Dec. 638; Cooper v. Mayhew, 40 Mich. 528; Turner v. Jenkins, 79 Ill. 228; Ralston v. Lahee, 8 Iowa 17, 74 Am. Dec. 291; Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212. The English rule as to guardians, it may be stated in passing, is not consistent with other rulings of the English courts as to trustees, for they have long held that although a guardian was a party yet he was not a real party, but an officer of the court, and for that reason he could not make an admission (using the word in its technical sense, and not in the sense of the declarations authorized in the New York case mentioned in the text). Eggleston v. Speke, 3 Mod. 258; Cowling v. Ely, 2 Stark. R. 266; Webb v. Smith, 1 Ry. & M. 106.

because they have no principals. In an Indiana case¹ Worden, J., says: "An executor or administrator is neither an agent nor an officer within the ordinary acceptation of those terms. He may be said, in some sense, to step into the shoes of the deceased. He represents the deceased in respect to his personal estate, having the care and management thereof. His admissions are competent evidence, in actions where the estate is represented by the executor or administrator making such admissions. It is a matter of every-day experience, in actions by or against executors or administrators, to give their admissions in evidence against them.'"

§ 46. **Admissions of trustees before clothed with trust.**—The force of a trustee's admission is but the reflex of the presumption that he will not violate his duty. It follows, therefore, that his admissions made before he was clothed with his trust are not competent.²

§ 47. **Admissions by party in different capacity.**—If an admission is made by a party while acting in one capacity, such admission is not, at least ordinarily, competent against him when acting in another capacity, and the reason usually assigned is that in his change of capacity he, in most instances, represents other interests than those he represented in his former capacity. The proposition that the admissions of a person in one capacity are not evidence against him in another capacity has been laid down without qualification by an eminent writer,³ but it would seem that if the admission of the

¹ *Eckert v. Triplett*, 48 Ind. 174, 17 Am. Rep. 735.

² See *Hill v. Buckminster*, 5 Pick. 391; *Faunce v. Gray*, 21 Pick. 243; *Emerson v. Thompson*, 16 Mass. 429; *Lashlee v. Jacobs*, 9 Humph. 719; *Giblehouse v. Strong*, 3 Rawle 437; *Cobb v. Lunt*, 4 Greenl. 503; *M'Craine's Executor v. Clark*, 2 Murphy 317; see note to *Witcomb v. Whiting*, Smith's Lead. Cases, 8th ed. 982, 983.

³ *Fenwick v. Thornton*, 1 Mood. & Malk. 51; *Webb v. Smith, R. & M.* 106; *Fraser v. Marsh*, 2 Stark. R. 37; *Plant v. M'Ewen*, 4 Conn. 544; *Webster v. LeCompte*, 74 Md. 249, 22 Atl. Rep. 232; *Mertz v. Detweiler*, 8 Watts & S. 376; *Taylor on Ev.*, § 755; *Greenl. on Ev.*, § 179, and see cases cited in next section.

⁴ 1 Phil. on Ev. (1849 ed.), § 377.

statement could affect no other interest than that of the declarant, it ought to be regarded as competent.¹

§ 48. **Admission of person interested who is not a party.**—If suit be brought in the name of a nominal plaintiff, or if the suit be on a contract made for the benefit of another, the admission of the person who will receive the benefit of performance is competent, although he may not be a party to the record.² Within the principle of the doctrine of this section is the case where an officer is sued for making a wrongful levy, and it appears that he has been indemnified by the execution plaintiff; in such a case the officer is but a nominal party and the admissions of the execution plaintiff, although not a party, are received.³

§ 49. **Admissions of strangers, when receivable.**—The doctrine that the admissions of strangers are sometimes receivable must be regarded as the last outpost in the territory of admissions. Such admissions are competent, however, if made before suit brought, where the question at issue is the right of the party introducing the admission to maintain suit on a certain demand against such person. Instances of the application of this rule are found in admissions by a debtor of his indebtedness in an action against the sheriff for permitting him to escape.⁴ In one case the declarations of a stranger as to the

¹ An admission by a wife is not competent against her while she is acting as the administratrix of her deceased husband. *May v. Little*, 2 Ired. L. 27, 38 Am. Dec. 707. To the same effect *Dent v. Dent*, 3 Gill (Md.) 482. The admissions of a person made while he was the distributee of an estate will not be received against him in his subsequent capacity of administrator. *Mangun v. Webster*, 7 Gill (Md.) 78.

² *Hanson v. Parker*, 1 Wills. 257; *North v. Miles*, 1 Camp. 389; *Smith v. Lyon*, 3 Camp. 465; *Bell v. Ansley*, 16 East 141; *Smith v. Vincent*, 15

Conn. 1, 38 Am. Dec. 52; 2 Stark. on Ev., star p. 23; 1 Phil. on Ev. (1849 ed.), § 374; 1 Greenl. on Ev., § 180. If the interest of the trustee, who is a party, and of his *cestui que trust* is not identical, the admission of the latter will not be received. *Doe v. Wainwright*, 3 Nev. & P. 598.

³ *Dowdon v. Fowle*, 4 Camp. 38; *Taylor on Ev.*, § 758; 2 Stark. on Ev., star p. 23; 1 Phil. on Ev. (1849 ed.), § 375; 1 Greenl. on Ev., § 180.

⁴ *Williams v. Bridges*, 2 Stark. R. 38; *Sloman v. Herne*, 2 Esp. 695; *Kemp-land v. Macauley*, Peake's Cases 65.

fact that the indebtedness sued on was the joint obligation of defendant and himself was received on an issue in abatement as to his non-joinder.¹ The limitation already suggested, that the declaration must be made before suit, is, obviously, a necessary one to prevent fraud,² and finds an analogy in bankruptcy proceedings, where the admission of the bankrupt made after the act of bankruptcy is not received to prove the debt of the petitioning creditor.³ The admissibility of the prior declarations of a bankrupt as to the fact of his indebtedness has been contended for, and admitted, as within the principle of the doctrine of this section, but it finds an even more solid foundation in the fact that the assignee stands as a privy in representation to the bankrupt.⁴

§ 50. **Admissions of co-plaintiffs and co-defendants.**—It was said by Lord Kenyon,⁵ that it was an “incontrovertible rule that an admission made by the plaintiff of record is admissible evidence.” In the same case Lawrence, J., observed that he had looked into the books, and could not find one case in which it had been held that an admission by the plaintiff of record was not evidence. As we have seen, some limitation must now be put upon this doctrine in the case of an assignor of a *chose in action*, suing for the benefit of his assignee; and perhaps in some other cases.⁶ As to the admissions of co-defendants, they stand upon a different ground, for it is the

¹ Clay v. Langslow, 1 M. & M. 45.

² 1 Greenl. on Ev., § 180.

³ Harwood v. Keys, 1 M. & Rob. 204; Watts v. Thorpe, 1 Camp. 376; Hoare v. Coryton, 4 Taunt. 560; Taylor v. Kinloch, 1 Stark. R. 139; 1 Phil. on Ev. (1849 ed.), 376.

⁴ 1 Phil. on Ev. (1849 ed.), 377. As to prior admissions of grantor of his indebtedness to the grantee where the deed is attacked for fraud, see Moss v. Dearing, 45 Iowa 530. In a garnishee proceeding, the admission of the prin-

cipal defendant that the garnishee had paid him, made after the service of the suit, is incompetent. Willis v. Holmes, 28 Ore. 265, 42 Pac. Rep. 989; Warren v. Moore, 52 Ga. 562.

⁵ Bauerman v. Radenius, 7 T. R. 659.

⁶ Ante, § 45. Where a husband is joined as plaintiff with his wife in a suit relating to her separate estate, his admissions are not evidence. Stuart v. Kissam, 2 Barb. 493.

right of the plaintiff to prove his case against each defendant, and in doing so he may ordinarily use the admissions of each defendant as against himself.¹ There is no difficulty about the operation of this rule in a case where the matters sought to be proved by a defendant's admission relate to some features of the case with which his co-defendant has no concern; and it seems reasonable too, as to a substantive fact upon which both defendants have joined issue against the plaintiff, that the admission of each defendant should be received as against himself.² But there are limits beyond which the extension of this doctrine would work a grave injustice. For instance, upon a contest of a will on the ground of undue influence or fraud, where the will was attacked as a whole, if the admission of each devisee or legatee as to separate facts were admitted, on the theory that they were admissible against him alone, the result would be, upon a protracted trial, not only that the jury would fail to remember against whom a particular admission should be charged, but it would be inevitable that the jury would combine such admissions in their relation to each other in such manner as to weld them into a composite whole, so that each devisee or legatee would have opposed to him the accumulated force of all the admissions. There are authorities which deny the right of introducing the several admissions in such cases,³ but many of them treat the question as disposed of when it is determined that such devisees or legatees have not a joint interest but a mere community of interest. If an admission is introduced which is competent against one defendant, but is not competent against his co-defendant, the proper course is to control its effect by an instruction.⁴ In the case of a joint obligation, where the admission of one defendant is evidence against both, it will not suffice to exclude the

¹ Forsyth v. Ganson, 5 Wend. 558, 21 Am. Dec. 241; Smith v. Vincent, 15 21 Am. Dec. 241; Smith v. Vincent, 15 Conn. 1, 38 Am. Dec. 52; Currier v. Silloway, 1 Allen 19; Smith v. Meiser, 11 Ind. App. 468, 38 N. E. Rep. 1092.

² See authorities cited in note 3 to § 27, *supra*; note 2, p. 36, *supra*.

³ Forsyth v. Ganson, 5 Wend. 558, 21 Am. Dec. 241; Smith v. Vincent, 15 Conn. 1, 38 Am. Dec. 52.

⁴ Smith v. Meiser, 11 Ind. App. 468, 38 N. E. Rep. 1092.

declaration that it was made by an obligor, who was in fact surety, and that he is protected against ultimate damnification by the fact that his co-defendant has an estate sufficient to meet the obligation.¹

¹Smith v. Vincent, 15 Conn. 1, 38 Am. Dec. 52.

CHAPTER II.

COLLATERAL EVIDENCE.

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- 93. Impeachment by contradictory statements.
- 94. Impeaching evidence not substantive.
- 95. Right to impeach character of witness.
- 96. Corroboration of witness.
- 97. Impeachment and corroboration of impeaching witness.

§ 51. **When proof of collateral facts is relevant.**—Sir James Stephen, in his Digest of the Law of Evidence,¹ says: “The word ‘relevant’ means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other.” If the existence of a particular fact is in issue, the competency of the testimony of a witness affirming the existence of such fact, by the demonstration of his senses, does not admit of doubt, but when the question arises as to the competency of testimony as to the existence of some other fact, as evidence tending to prove the existence of the fact or question in issue, there is often much difficulty in determining whether such testimony is relevant. “All human dealings and transactions are a vast context of circumstances, interwoven and connected with each other, and also with the natural world, by innumerable mutual links and ties. Not one fact or circumstance ever happens which does not owe its birth to a multitude of others, which is not connected on every side by kindred facts, and which does not tend to the generation of a host of dependent ones, which necessarily coincide and agree in their minutest bearings and relations, in perfect harmony and concord, without the slightest discrepancy or disorder.”² It is in the absolute fidelity of fact with fact that we observe the perfect working of the law of truth. In an inquiry as to whether a fact exists, we may examine an antecedent, collateral or subsequent fact, with the assurance that a lack of harmony between the fact under inquiry, if such fact exists, and the fact examined is impossible. The truth can not deceive us. If the established circumstances be absolutely inconsistent with the existence of the supposed fact, the hypothesis can not be true, and, if without defect in our logic, we can reason that the established circumstances can not exist unless the supposed fact exists, then we may affirm its existence with a certainty that can not falter. But when the extrinsic circumstances are estab-

¹ Reynold's ed., p. 5.

² 1 Stark. on Ev., star p. 496.

lished, we are still admonished that they may have no relation to the question under inquiry, or, if that be clear, there may yet be undisclosed intermediate facts which, if known, would vary the relation between the remoter fact and the hypothesis. When we ascertain that an extrinsic fact has such a relation to the supposed fact that we can affirm that the existence of the former renders the existence or non-existence of the latter certain, or more or less probable, then we regard evidence tending to prove the existence of such extrinsic fact as relevant.¹ In a Maine case² it is said: "Testimony can not be excluded as irrelevant which would have a tendency, however remote, to establish the probability or improbability of the fact in issue."³ Other authorities lay down the doctrine more guardedly. Thus, the supreme court of Vermont⁴ said: "All facts and circumstances upon which any reasonable inference or presumption can be founded, as to the truth or falsity of the issue or of a disputed fact, are admissible in evidence."⁵ Sir James Stephen states that "the judge may exclude evidence of facts which, though relevant, or deemed to be relevant to the issue, appear too remote to be material under all the circumstances of the case."⁶ Mr. Best, the most philosophical of all the writers on evidence, says: "The remaining application of this great principle, which we propose to notice at present, seems based on the maxim, '*In jure non remota causa, sed proxima spectatur.*' It may be stated thus, that, as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires an open and visible connection between the principal and evidentiary facts, whether they be ultimate or sub-alternate. This does not mean a necessary connection—that would exclude all presumptive evidence—but

¹ Mr. Wharton says, in his work on evidence (§ 20), that "relevancy is that which conduces to the proof of a pertinent hypothesis." Quoted approvingly in *State v. O'Neil*, 13 Ore. 183, 9 Pac. Rep. 284; *State v. Moore*, 81 Iowa 578, 47 N. W. Rep. 772.

² *Trull v. True*, 33 Me. 367.

³ To the same effect, *Scott v. State*,

56 Miss. 287; *State v. O'Neil*, 13 Ore. 183, 9 Pac. Rep. 284.

⁴ *State v. Burpee*, 65 Vt. 1, 25 Atl. Rep. 964, 36 Am. St. Rep. 775.

⁵ To the same effect, *Wells v. Fairbank*, 5 Tex. 582.

⁶ Digest Law of Ev., art. 2. See *Medsker v. Pogue*, 1 Ind. App. 197, 27 N. E. Rep. 432.

such as is reasonable, and not latent or conjectural. In this our judicial evidence partakes of the very essence of all sound municipal law, and preserves the lives, liberties, and properties of men, by placing an effectual rein on the imagination of those entrusted with the administration of justice, and preventing decisions on remote inferences and fancied analogies."¹ It is the writer's view that Mr. Best states the law correctly in the section above quoted. His statement, however, is not out of accord with the quotation from the Maine case, *supra*.² As pointed out by Mr. Best, there need not be proof of a connection between the evidentiary and the principal fact. The inference may follow, although there may possibly be intermediate facts which, if known, would make it apparent that the inference was an incorrect one. In this respect evidence may be competent although its bearing on the principal fact is remote.³ Thus, as some one, whom the writer can not recall, has pointed out, if A was murdered in a city of one hundred thousand inhabitants, it would be proper to show that the de-

¹ Best on Ev. (Morgan's ed.), § 90. To the same effect, *United States v. Ross*, 92 U. S. 281; *Manning v. Insurance Co.*, 100 U. S. 693; *Douglass v. Mitchell*, 35 Pa. St. 440; *McAleer v. McMurray*, 58 Pa. St. 126; *Cleveland, etc., Ry. Co. v. Wynant*, 114 Ind. 525, 17 N. E. Rep. 118, 5 Am. St. Rep. 644; *Medsker v. Pogue*, 1 Ind. App. 197, 27 N. E. Rep. 432.

² *Trull v. True*, 33 Me. 367.

³ "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." *Stevenson v. Stewart*, 11 Pa. St. 307. "The modern tendency of legislation and of the decisions of courts is to give as

wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases because unimportant, and possibly irrelevant, testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused." *Holmes v. Goldsmith*, 147 U. S. 150, 13 Sup. Ct. Rep. 288. In *Pack v. Thomas*, 13 S. & M. (Miss.) 11, 51 Am. Dec. 135, it is said: "The competency of evidence is to be determined according to its legal effect. It is immaterial how long or circuitous the chain may be by which the end is reached." Evidence which is too slight to prove a fact in issue, but which is illustrative of other facts or corroborative of other testimony, which point to the conclusion sought to be established, is relevant and ought to be admitted. *Brown v. Clark*, 14 Pa. St. 469.

fendant was in the city at the time.¹ So if the question should be as to whether a locomotive which had recently passed had set out a fire, it would be proper to show that the netting of its spark arrester was out of order, or that it habitually set fire to combustibles along the right of way, as such proof would tend, in connection with other evidence, to prove that the fire had started from it.² The cases afford many instances of evidence held admissible as affecting the probabilities concerning the principal question.³

¹ As Mr. Wharton states (Ev., § 21), it is not necessary to offer at once all the circumstances necessary to prove the ultimate proposition. The party seeking to prove or disprove it may proceed step by step, offering link by link. Whatever is a condition either in the existence or non-existence of a relevant hypothesis may be thus shown."

² In *Ireland v. Cincinnati, etc., R. Co.*, 79 Mich. 163, 44 N. W. Rep. 426, it was a question in issue whether the defendant's locomotive set fire to plaintiff's factory. *Held*, that defendant was entitled to show that within a short distance from plaintiff's factory there was a stationary boiler with a smoke-stack; that the fire used to make steam in such boiler was fed with pine slabs; that the smoke-stack had no spark arrester upon it, and that such boiler was in use at the time of the fire.

³ In *Campau v. Moran*, 31 Mich. 280, the issue was as to the contract price of an article. The evidence of the parties was in direct conflict and pretty evenly balanced. It was held that evidence that the cost of performance was greatly in excess of, or greatly below, the price fixed by one of the parties, was competent, as rendering it probable that the price agreed on was the price nearest the cost of production. To the same effect, see *Saunders v. Gallagher*, 53

Minn. 422, 55 N. W. Rep. 600. Where the question was as to whether a machine was sold on credit, or whether a conditional contract of sale was entered into, the court held that it was competent to introduce, as a corroboratory circumstance of the latter claim, evidence that the purchaser was in notoriously bad financial credit at the time. *Buswell Trimmer Co. v. Case*, 144 Mass. 350, 11 N. E. Rep. 549. In *Probst v. Delamater*, 100 N. Y. 266, 3 N. E. Rep. 184, and *Fitzgerald v. Town of Weston*, 52 Wis. 354, 9 N. W. Rep. 13, it is held, where the question is as to whether a person was negligent at a particular time, and direct evidence has been offered tending to show such fact, that it is competent to prove that such person was intoxicated at the time. In *Seligman v. Rogers*, 113 Mo. 642, 21 S. W. Rep. 94, the question was as to whether defendant owed plaintiff \$16,000. The plaintiff claimed that such indebtedness had existed for a considerable time. It was held competent for the defendant to show, he having denied the claim under oath, that during the whole time he had on deposit at a bank a daily balance of not less than \$14,800, and that generally he had a sum on deposit exceeding \$17,000. The court put its ruling on the ground that it was a matter within the "experience of common life" that men do

But this proposition finds its limitation in the further proposition that an inference can not be based on an inference.

§ 52. Same subject—Inferences based on inferences.—The leading case on the last proposition of the preceding section is that of *United States v. Ross*.¹ The following extract from the case is self-explanatory: “It is obvious that this presumption could have been made only by piling inferences upon inferences, and presumption upon presumption. Because the thirty-one bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards, at some unknown time (whether before or after August 19, does not appear), was shipped on the road to Kingston, it is inferred that the claimant’s cotton was part of the shipment. Because somebody’s cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 18th of August, 1864, it is inferred that the claimant’s thirty-one bales, presumed to have reached Chattanooga, thus arrived and forwarded; and because forty-two bales were received on that day at Chattanooga from the quartermaster at Kingston, it is inferred that the claimant’s bales were among them. These seem to be nothing more than conjectures.

not ordinarily let debts run, accumulating interest, when they have money in the bank with which to pay them. Where the plaintiff, a brakeman, who had been injured by a sliver projecting from the inside of a rail, sued the defendant railroad company, charging it with negligence in omitting to remedy the defect, the supreme court of Minnesota held that it was competent for the defendant to prove by a railroad employe of twenty-three years’ experience that he had never heard of such an accident before. *Doyle v. St. Paul, etc., R. Co.*, 42 Minn. 79, 43 N.W. Rep. 787. In *Fort Worth, etc., R. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. Rep. 137, where an engineer sued a

railroad company, charging it with negligently failing to keep its road-bed in proper condition, whereby he was hurt while operating a train, it was held proper for plaintiff to prove that on well ballasted roads trains could safely run at the rate of sixty miles an hour. Where the question at issue was as to whether the defendant had seduced a certain girl, it was held that the extreme poverty and dependence of the girl was a circumstance proper to go to the jury with the rest of the evidence. *Bathrick v. Detroit Post and Tribune Co.*, 50 Mich. 629, 16 N. W. Rep. 172, 45 Am. Rep. 63.

¹ *United States v. Ross*, 92 U. S. 281.

They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences, presumptions resting on another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or law is reliable if drawn from inferences which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not presumed." In a later case,¹ the same court said: "A jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an immediate connection with, or relation to, the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact the law recognizes are immediate inferences from facts proved."² The doctrine of this section is well illustrated by a Massachusetts case,³ where the action was to recover damages from the defendant, on the ground that he had forcibly had carnal intercourse with the plaintiff and had thereby infected her with a venereal disease. It was held that evidence was incompetent that the defendant had spent a night at a house of ill fame some considerable time before. In this case, if the fact were granted that the defendant had had connection with the plaintiff, it would be a matter of inference as to whether he had thereby communicated to her such disease, but such inference can not be based on the further inference or conjecture that he contracted a venereal disease on the occasion of his visit to the house of ill fame. It was properly held, however, in a Michigan case,⁴ where a girl, who claimed to have been raped by the defendant, testified that the connection

¹ *Manning v. Insurance Co.*, 100 U. S. 693.

² In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter

should be established by direct evidence, as if they were the very facts in issue. 1 Stark. on Ev., p. 80.

³ *Morrissey v. Ingham*, 111 Mass. 63.

⁴ *People v. Glover*, 71 Mich. 303, 38 N. W. Rep. 874.

caused a venereal disease, that it was proper to show that the defendant was suffering from a like disease.

§ 53. **Circumstantial evidence.**—It is essential to the conclusiveness of circumstantial proof: First, that the circumstances from which the conclusion is drawn should be fully established; second, that all of the facts should be consistent with the hypothesis; third, that the circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved, and lastly, it seems that mere circumstantial evidence ought in no case to be relied on where direct and positive evidence, which might have been given, is willfully withheld by the prosecutor.¹

§ 54. **Proof of facts from which no just inference can be drawn.**—It frequently happens that an item of evidence is tendered which would be competent, if it was followed up with other evidence which connected it with the principal fact, or which, under such circumstances, would authorize an inference concerning such principal fact, but if such item of evidence is tendered without any proposal to make it relevant, and if, while standing alone, it does not justify the inference the party seeks to have drawn, it is the court's duty to reject such evidence. Otherwise stated, if an item of evidence will serve no purpose, while standing alone, except to generate a bare suspicion, the court should prevent the attention of the jury from being dis-

¹ Starkie on Ev., star p. 507, *et seq.* "The circumstances are facts from which the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence as if each one were itself the main fact in issue." *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711. See *Henderson v. State*, 14 Tex. 503; *Potterfield v. Com.*, 95 Va. 801, 22 S. E. Rep. 352. The mere accumulation of circumstances consistent with guilt will not justify a conviction. *Cavender v. State*, 126 Ind. 47, 25 N. E. Rep. 875. Circumstantial evidence is defined to be "where the proof applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy." *United States Express Co. v. Jenkins*, 65 Wis. 542, 25 N. W. Rep. 549. Negligence may be proved circumstantially. *Jacksonville, etc., R. Co. v. Peninsular Land Co.*, 27 Fla. 1, 9 So. Rep. 661; *Railroad Co. v. Bales*, 16 Kan. 251; *Railroad Co. v. Schultz*, 93 Pa. St. 341.

tracted by a circumstance which is incapable of being put to any use in the consideration of the case. For instance, where a person is on trial for crime he can not shield himself by evidence of a single, isolated threat, uttered by a third person against the victim.¹ In an Iowa case² it was held that evidence, offered by the defendant, tending merely to show that some one else was in the neighborhood of the place where the crime was committed, who might have committed it, was properly rejected. So in a North Carolina case,³ evidence was held inadmissible that another had malice towards the deceased, had threatened his life, and had an opportunity to take it, but it was intimated that such evidence would have been competent if there had been some proof of the guilt of such third person. In a Texas case,⁴ where evidence of another's threat was excluded, the court assigned as a reason for such exclusion that evidence must tend to prove the issue or constitute a link in the chain of proof.⁵ But where the question is an open one upon the evidence as to whether it was the defendant or the person injured who was the assaulting party, evidence of threats upon the part of either, although uncommunicated, is competent as bearing upon the probabilities of the question.⁶

¹ *Woolfolk v. State*, 85 Ga. 69, 11 S. E. Rep. 814; *State v. Davis*, 77 N. Car. 483; *Crookham v. State*, 5 W. Va. 510; *Rhea v. State*, 10 Yerg. 258; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *State v. Beaudet*, 53 Conn. 536, 55 Am. Rep. 155; *Walker v. State*, 6 Tex. App. 576; *Sible v. State*, 3 Heisk. 137.

² *State v. Beck*, 73 Iowa 616, 35 N. W. Rep. 684.

³ *State v. Davis*, 77 N. Car. 483.

⁴ *Walker v. State*, 6 Tex. App. 596.

⁵ To the same effect, *Woolfolk v. State*, 85 Ga. 69, 11 S. E. Rep. 814. In *Hensley v. State*, 9 Humph. 243, the defendant was charged with arson. The evidence on behalf of the state showed that a mill-house was burned in the night; that the defendant was hostile to the owner, and had threat-

ened to burn the house; that the tracks of a horse were discovered near the mill, and that the defendant was in the neighborhood of the house at the time. Held error to exclude evidence offered by the defendant that another person, one John Richards, had threatened to burn the mill-house and was in the neighborhood when it burned. In *Sible v. State*, 3 Heisk. 137, it was said of the above case: "It goes quite as far as we think it consistent with the well established rules of evidence to go, and we are not inclined to extend the principle of allowing declarations of third persons to be given in evidence, either to criminate or exonerate a defendant in criminal prosecutions."

⁶ *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492; *Jewett v. Banning*, 21

The proposition that evidence is to be excluded which at the most can generate but a bare suspicion in the mind of the jury will find further illustration in the note.¹

N. Y. 27; *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. Rep. 961; *Com. v. Plummer*, 147 Mass. 601, 18 N. E. Rep. 567; *People v. Jones*, 99 N. Y. 667, 2 N. E. Rep. 49; *Wiggins v. People*, 93 U. S. 465; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *Pritchett v. State*, 22 Ala. 39, 58 Am. Dec. 250; *Burns v. State*, 49 Ala. 370; *State v. Turpin*, 77 N. Car. 473, 24 Am. Rep. 455; *Wilson v. State*, 30 Fla. 234, 9 So. Rep. 835 (a leading case on this subject); *Johnson v. State*, 54 Miss. 430; *State v. Williams*, 40 La. Ann. 168, 3 So. Rep. 629; *Mayfield v. State*, 110 Ind. 591, 11 N. E. Rep. 618; *Brown v. State*, 105 Ind. 385, 5 N. E. Rep. 900; *Palmer v. People*, 138 Ill. 356, 28 N. E. Rep. 130, 32 Am. St. Rep. 146; *Campbell v. People*, 16 Ill. 17, 61 Am. Dec. 49; *People v. Thomson*, 92 Cal. 506, 28 Pac. Rep. 589; *State v. Keefe*, 54 Kan. 97, 38 Pac. Rep. 302; *People v. Arbold*, 15 Cal. 476; *People v. Scoggins*, 37 Cal. 676. The evidence must have some tendency to establish the constituents of the right to destroy life as a matter of self-defense before any state of facts exists in the case upon which testimony of character, threats, ill-feeling, etc., of the deceased could shed any light. *Rutledge v. State*, 88 Ala. 85, 7 So. Rep. 335; *State v. Keefe*, 54 Kan. 97, 38 Pac. Rep. 302; *Rauck v. State*, 110 Ind. 384, 11 N. E. Rep. 450; *United States v. Leighton*, 3 Dak. 29, 13 N. W. Rep. 347; *State v. Harris*, 59 Mo. 550; *Powell v. State*, 19 Ala. 577; *Atkins v. State*, 16 Ark. 568; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Newcomb v. State*, 37 Miss. 383. But if there is the slightest evidence of a hostile demonstration upon the part of the injured person, evidence of his prior threats should be admitted. *Garner v. State*, 28 Fla. 113, 9 So. Rep. 835, 29 Am. St. Rep. 232; *Wilson v. State*, 30 Fla. 234, 11 So. Rep. 556; *Wiggins v. People*, 93 U. S. 465; *People v. Scoggins*, 37 Cal. 676; *Myers v. State*, 62 Ala. 599; *Johnson v. State*, 54 Miss. 430. It is proper to show a subsequent reconciliation. *Mack v. State*, 48 Wis. 271, 4 N. W. Rep. 449. But that fact does not render evidence of prior threats incompetent. *Com. v. Holmes*, 157 Mass. 233, 32 N. E. Rep. 6, 34 Am. St. Rep. 270. Remote threats may be properly admitted in evidence. *Com. v. Goodwin*, 14 Gray 55; *Com. v. Quinn*, 150 Mass. 401, 23 N. E. Rep. 54. It was held in *Com. v. Holmes*, 157 Mass. 233, 32 N. E. Rep. 6, 34 Am. St. Rep. 270, that the question as to the admissibility of remote threats made by the defendant addresses itself to the discretion of the court. Proof of threats, even when accompanied with proof of the *corpus delicti*, will not justify a conviction. *Wills on Cir. Ev.* (Am. ed. 1853), 62. In the case of *Jones v. State*, 57 Miss. 684, the evidence showed that the defendant made a threat that he would kill A, if the mistress of the defendant went to live with the former. She went the next day, and A was assassinated that night. Held, that defendant was entitled to an instruction that upon this evidence he was entitled to an acquittal. See *State v. Glahn*, 97 Mo. 679, 11 S. W. Rep. 260. The defendant is not entitled to the particulars of a private difficulty with deceased. *Sanders v. Com.* — Ky. —, 18 S. W. Rep. 528.

¹In an action for bastardy it is proper to reject testimony that the re-

§ 55. Collateral evidence.—While there are occasional seeming exceptions, yet there exists in the main a sharply de-

latrix kept company with other men, in the absence of any proof of undue familiarity with them. *Haverstick v. State, ex rel. Haverstick*, 6 Ind. App. 595, 32 N. E. Rep. 785, 34 N. E. Rep. 99. But it was held in *State v. Borie*, 79 Iowa 605, 44 N. W. Rep. 824, that it was proper to show that the relatrix, about the time she conceived, had frequent opportunities for sexual intercourse with another man, the evidence showing that some seven or eight years before she had been locked in a room with him at a hotel for several hours. See *Easdale v. Reynolds*, 143 Mass. 126, 9 N. E. Rep. 13. In a prosecution for seduction, it was held that bare proof that the girl's home was a house of ill fame was incompetent, she being a minor and living with her mother. *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177. *Hall v. State*, 132 Ind. 317, 31 N. E. Rep. 536, was a prosecution for murder. The defense advanced the theory of suicide. In the course of the opinion the court said: "Proof of traits of character in the deceased, if any existed, showing a suicidal tendency, might be made, but isolated facts as to financial conditions and domestic troubles are collateral." In *Thistlewait v. Thistlewait*, 132 Ind. 355, 31 N. E. Rep. 946, the question was whether a person who had received property had received it by way of gift or by way of advancement. It was held incompetent for the party claiming that it was a gift, he being a child of the decedent by his first wife, to prove that the property was purchased by decedent with money received from his first wife. The court said: "The introduction of such evidence in this instance would, in view of its remoteness as to time and its indirection as to the main question, have led into a collateral investigation not competent under the issues." In *Nash v. Hoxie*, 59 Wis. 384, 18 N. W. Rep. 408, the issue was as to whether the defendants had contracted with plaintiffs that the latter should saw a certain number of feet of logs, which were to be paid for by delivery to plaintiffs of 100,000 feet of hemlock logs. Defendants offered to prove that they did not have or own 100,000 feet of hemlock logs. Held, incompetent. The court, after stating that the evidence was incompetent unless the surrounding circumstances were within *res gestæ*, said: "It is difficult to perceive how any extraneous facts and circumstances can be *res gestæ* of the fact that no contract was made. They might be, if the contract was made, for the purpose of determining its terms and proper construction. They must be of the essential circumstances of the transaction, and if no such transaction was entered into it can have no surrounding circumstances or *res gestæ*." It was held in this case that it was incompetent for one defendant to prove that he had advised his partner not to enter into any contract with plaintiffs unless it was put in writing. In *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. Rep. 331, the plaintiff sued for damages occasioned by a fall upon a sidewalk glazed with ice. There was no evidence tending to show that he was not sober. Held, that an objection to a question asked by defendant as to whether plaintiff was a man of intemperate habits was rightly sustained. In *McCulloch v. Dobson*, 133 N. Y. 114, 30 N. E. Rep. 641, which was a suit for a

finer exclusionary rule that remote and collateral facts from which no fair and reasonable inferences can be drawn are to be excluded. The reason for this doctrine is twofold. 1st. The party against whom such evidence is offered is not apprised by the pleadings that such evidence will be tendered, and he would, therefore, in all probability, be unprepared to meet it. 2d. Such evidence would tend to distract the attention of the jury from the real point in issue, and would often prejudice and mislead.¹

breach of covenant for the return of property, including machinery, in good condition, it was held that proof offered by the plaintiff that the defendant employed incompetent hands was properly excluded, where the evidence did not go further, as such proof did not furnish a basis for a proper inference that they necessarily damaged the machinery. Where a witness had testified to a confession by the defendant in the presence of one C., and the latter, when called by defendant as a witness, denied it, it was held incompetent on cross-examination to ask him if he did not subsequently say that he knew that the accused was the guilty man. The court said: "The conversation or declaration had no relation except by argument or inference to the testimony given by the witness in his examination in chief." *Welch v. State*, 104 Ind. 347, 3 N. E. Rep. 850. *State v. Moore*, 81 Iowa 578, 47 N. Rep. 772, is a case where the defendant was charged with incest, and it was held that testimony that the defendant had quarreled with his sons and had sent them away several months before any improper relations existed between him and the woman, so far as the evidence showed, was inadmissible, as the facts were too remote to warrant their introduction as testimony in the case.

¹Starkie on Ev., star p. 222; 1 Greenl. on Ev., § 52; Baltimore, etc.,

R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72. In *Costello v. Crowell*, 139 Mass. 588, 2 N. E. Rep. 698, where the question at issue was as to whether the note sued on was forged, the defendant offered testimony of the declaration of the plaintiff as to his ability to imitate signatures. The court, in holding the evidence incompetent, said: "We are of opinion that the court rightly rejected this evidence. In cases where a person is accused of a crime it is not competent to show as evidence of the *corpus delicti* that he has committed similar offenses, or that he is of bad character, or that he has the capacity and means of committing the crime. The argument in favor of admitting such evidence is plausible. It might aid the jury if they could know the character of defendant, whether he is a man morally and physically able and liable to commit the crime, but the law excludes such evidence upon grounds of public policy, to prevent the multiplication of issues in a case and to protect a party from the injustice of being called upon without notice to explain the acts of his life not known to be connected with the offense charged. If the fact that a defendant had committed a similar crime is not admissible, it is difficult to see how less pregnant evidence, that he had the disposition or capacity and means to commit it, can be competent. There

§ 56. **Similar but unconnected facts.**—With a few exceptions, which will be noticed in the course of this chapter, the rule is that a fact which renders the existence or non-existence of any fact in issue probable, by reason of its general resemblance thereto, and not by reason of its being connected therewith, is deemed not to be relevant to such fact.¹

are many cases where the fact that a defendant has the means of committing a crime has been admitted in evidence against him, but it will be found that in such cases the evidence is not admitted as proof of the *corpus delicti*, but for the purpose of showing a guilty intent or knowledge on the part of the defendant, or of identifying him as the person who committed the crime. * * * In the case at bar the question whether the plaintiff forged the note in suit was not in issue. The sole issue is whether the note was forged. The evidence was offered to prove the forgery—the *corpus delicti*—and for this purpose we think that it was inadmissible." In *People v. McGuire*, 135 N. Y. 639 (more fully reported in 32 N. E. Rep. 146), where the defendant was charged with homicide, it was held competent, as bearing on the question of intent, to show that shortly before he killed the deceased he had been shooting at a mark. Where the defendant was charged with producing an abortion, it was held proper to admit her declarations, made several years before, that she had produced abortions, and had the instruments with which to perform such operations, as the evidence tended to show a knowledge and intent, and the possession of the necessary means with which to accomplish the crime. *People v. Sessions*, 58 Mich. 594, 26 N. W. Rep. 291.

¹ Art. 10, Stephen Dig. Law of Ev. See *post*, § 66. Where the question

was as to whether rent was payable quarterly or half-yearly, Lord Kenyon would not allow the plaintiff to show that his other tenants paid their rent quarterly. *Carter v. Pryke*, Peake 95. In 1 Phillips on Evidence (1849 ed.), 460, it is said: "It is considered in general that no reasonable presumption can be drawn as to the making or the execution of a contract by a party with one person in consequence of the mode in which he has made or executed similar contracts with other persons." In *Newhall v. Appleton*, 102 N. Y. 133, 6 N. E. Rep. 120, the question at issue was as to whether plaintiff, who was a book agent, in the employ of defendant, was to be paid \$4 on each subscription taken, or whether that sum was to be paid only in the event that the subscription was collected. It was held that the account-books of defendant, showing his manner of settlement with other canvassers, could not be introduced. In *Aiken v. Kennison*, 58 Vt. 665, 5 Atl. Rep. 757, the court held that while proof of prior similar business transactions was collateral, yet "the existence of any course of office or business according to which it naturally would, or would not, have been done, is a relevant fact." But it was held in *Jackson v. Smith*, 7 Cow. 717, that a uniform custom to loan at usurious interest was not evidence of the fact of usury in a particular instance. In *Thompson v. Bowie*, 71 U. S. 463, it was held that evidence was not competent that a person was in the

§ 57. Collateral crime.—Proof of a distinct substantive offense is never admissible, unless there is some logical connec-

tion, the evidence would have been proper to bring notice to the defendant of deficiencies in that kind of a structure. Where the plaintiff sued for injuries sustained by him by the falling of a fire-wall and cornice on defendant's building, and the defendant claimed that the cornice had been pulled down by wires attached without his knowledge and consent, it was held that his offer to prove that a number of cornices had fallen in the city, and that in each instance the cornice had been pulled down by wires, was properly rejected. *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. Rep. 628. The case of *Lincoln v. Taunton Copper Mang. Co.*, 9 Allen 181, was an action brought to recover damages for an injury to plaintiff's land, caused by noxious and poisonous substances, discharged, in the shape of gas and liquid, from the defendant's copper-mill, reaching said land. It was held that evidence should be rejected as to the effect as to other lands in the same vicinity subjected to the same influences, and also that evidence was incompetent that the productiveness of other lands in the neighborhood, not subject to the same influences, was unimpaired. In *Darling v. Stanwood*, 14 Allen 504, it was held that it could not be shown that the cotton in question had been wet by rain, in its voyage from New Orleans to Boston, by proving that other cotton shipped about the same time from the former to the latter point was wet with rain. In *Rehburg v. City of New York*, 99 N. Y. 652, 2 N. E. Rep. 11, the plaintiff was injured by the falling of a pile of brick. The plaintiff asked a witness the question: "What habit of gambling when drunk, in order to lend greater probability to a claim that the note in suit was given for a gaming debt. Where the question was as to whether a sale of guano was upon condition that it was not to be paid for unless a certain quantity was furnished, it was held incompetent for the defendant to prove by the plaintiff, on cross-examination, that he had made other sales upon similar conditions. *Hollingham v. Head*, 4 C. B. N. S. 388. In *Campbell v. Russell*, 139 Mass. 278, 1 N. E. Rep. 345, the plaintiff sued to recover the balance which he claimed to be due under a contract for building a house. The defendant contended that the work had been done in an unskillful and unworkmanlike manner. It appearing, without dispute, that the floors had settled, it became a question whether the defect was one for which the plaintiff was responsible, or whether it was the fault of the plan. The defendant offered evidence that in another house built by the same architect, in which some of the timbers and spans were similarly constructed, the timbers had not settled and the floors had not sagged. Held, incompetent. In *Carson v. Godley*, 26 Pa. St. 111, 67 Am. Dec. 404, the plaintiff charged the defendant with negligence in the construction of a store-building, as a result of which, it was charged, the building fell. The court held that evidence of the fall of other buildings built by defendant in the same row, was incompetent to prove his carelessness or want of ability as a builder, but the court suggested that if it had been shown that the other buildings were of the same character, and that they had fallen before the

construction of the building in question, the evidence would have been proper to bring notice to the defendant of deficiencies in that kind of a structure. Where the plaintiff sued for injuries sustained by him by the falling of a fire-wall and cornice on defendant's building, and the defendant claimed that the cornice had been pulled down by wires attached without his knowledge and consent, it was held that his offer to prove that a number of cornices had fallen in the city, and that in each instance the cornice had been pulled down by wires, was properly rejected. *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. Rep. 628. The case of *Lincoln v. Taunton Copper Mang. Co.*, 9 Allen 181, was an action brought to recover damages for an injury to plaintiff's land, caused by noxious and poisonous substances, discharged, in the shape of gas and liquid, from the defendant's copper-mill, reaching said land. It was held that evidence should be rejected as to the effect as to other lands in the same vicinity subjected to the same influences, and also that evidence was incompetent that the productiveness of other lands in the neighborhood, not subject to the same influences, was unimpaired. In *Darling v. Stanwood*, 14 Allen 504, it was held that it could not be shown that the cotton in question had been wet by rain, in its voyage from New Orleans to Boston, by proving that other cotton shipped about the same time from the former to the latter point was wet with rain. In *Rehburg v. City of New York*, 99 N. Y. 652, 2 N. E. Rep. 11, the plaintiff was injured by the falling of a pile of brick. The plaintiff asked a witness the question: "What

tion between the two, from which it can be said that proof of the one tends to establish the other.¹ Thus, in a prosecution for rape, testimony would not be competent that at a time not comprehended within the *res gestæ* the defendant had committed a rape on another woman.² (Where a defendant is on trial.

was the difference you observed between this and other piles of old brick?" The court said: "The characteristics of other brick piles could not affect the question as to whether the pile in question was properly constructed or was unsafe or dangerous. Whether it was unsafe or dangerous could only be determined by proof of its own features and not by evidence showing the construction of other piles of brick." On an issue involving the quality of baking-powder, the manufacturer had testified that his baking-powder was all of one grade. It was held incompetent for others to testify that they had purchased baking powder of his manufacture and that it was good. *Henkel v. Burke*, (Me.) 10 Atl. Rep. 249. Where the husband of one of the defendants, on trial for adultery, testified to facts tending to show adultery, it was held that substantive evidence that he had before accused his wife of similar acts of which she was not guilty was not admissible. *Com. v. Trider*, 143 Mass. 180, 9 N. E. Rep. 510. While an expert may vouchsafe an opinion based on his experience, yet he can not be asked by the party calling him to detail particular like cases which have come under his observation. Thus, where the plaintiff was run over by an engine which had started itself, and it was claimed by the plaintiff that a defective throttle had caused the engine to start, the defendant asked a witness the question: "Have you ever known of instances in which engines, steamed up, have moved

without human agency, and independent of any defect that you could discover in any part of the engine?" Held, inadmissible, as raising a collateral issue. *Hurd v. Union Pac. Ry. Co.*, 8 Utah 241, 30 Pac. Rep. 982. To the same effect *Medsker v. Pogue*, 1 Ind. App. 197, 27 N. E. Rep. 432.

¹ *Faris v. People*, 129 Ill. 521, 21 N. Rep. 821; *State v. Jackson*, 95 Mo. 623, 8 S. W. Rep. 749.

² *Janzen v. People*, 159 Ill. 440, 42 N. E. Rep. 862; *Ogle v. Brook*, 87 Ind. 600, 44 Am. Rep. 778; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69. So, on an issue as to whether the defendant had slandered the plaintiff, it was held that it was error to permit evidence to be introduced that the defendant had slandered another person two or three years before. *Sullivan v. O'Leary*, 146 Mass. 322, 15 N. E. Rep. 775. It is not proper to show that the defendant has committed a disconnected larceny. *People v. Tucker*, 104 Cal. 440, 38 Pac. Rep. 195; *State v. Goetz*, 34 Mo. 85; *Smith v. State*, 17 Neb. 358, 22 N. W. Rep. 780. In *State v. Baker*, 23 Ore. 441, 32 Pac. Rep. 161, it was held proper to prove that the defendant was found in possession of other stolen property taken upon the same night as the property in question. But it was held in *People v. Jacks*, 76 Mich. 218, 42 N. W. 1134, that it was not proper to prove, in connection with evidence of the defendant's possession of the goods described in the charge, that he also had possession of goods taken from a number of other persons at different

charged with the commission of a particular crime, it is never admissible to show a prior general disposition to commit crimes of that character, for the purpose of increasing the probability that he committed the crime charged.¹ But prior attempts by

times. So, it is not competent to show that the defendants were confederates in the commission of the crime charged by evidence that they had been jointly engaged, before the time in question, in the commission of a crime. *State v. Graham*, 61 Iowa 608, 17 N. W. Rep. 192.

¹*Thompson v. Bowie*, 71 U. S. 463; *State v. Field*, 14 Me. 244, 31 Am. Dec. 52. See *Costello v. Crowell*, 139 Mass. 588, 2 N. E. Rep. 698. So, in *Sutton v. Johnson*, 62 Ill. 209, a civil suit for an assault with intent to commit rape, it was held the defendant's prior declaration "that he and his wife had not been getting along together, and that he had been too intimate with the hired woman, or forced to be too intimate with the hired woman" (the latter not being the person claimed to have been assaulted), was incompetent. In *People v. Sharp*, 107 N. Y. 427, 14 N. E. Rep. 319, 1 Am. St. Rep. 851, *Peckham, J.*, in the course of a concurring opinion says: "There is not room for much discussion in regard to the general principle upon which evidence that proves, or tends to prove, the prisoner guilty of other felonies or misdemeanors, is admitted. It is conceded on all sides that the admission of such testimony forms an exception, and a very material and important exception, to the general rule of evidence. The general rule is that, when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in

his life-time is wholly excluded. But for the purpose of showing guilt of the offense for which the prisoner is on trial, as also for the purpose, where that is important, of showing the motive or intent with which an act claimed to be a crime was committed, evidence which is material upon such issues is admitted, although it may also tend to show, or even directly prove, the guilt of the accused of some other felony or misdemeanor. Whether the evidence in any particular case comes within the well-known exceptions to the general rule is often the difficult question to solve, and not as to what the rule itself really is. Thus, there is a class of cases in which evidence is admitted where it is material to show guilty knowledge of the character of the act committed by the prisoner. A good illustration of this class of cases is in the trial of an indictment for passing counterfeit money. Evidence of the passage of like money within a reasonable time before or after the commission of the offense for which the prisoner is on trial is admitted for the purpose of showing that when he passed the money in question it was not through ignorance of its character. A man might think the money he passed was good and he might be mistaken once, or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit. Hence evidence of such repetition bears directly and materially upon the issue before the jury. To this same class would belong the case of an indictment for

the defendant to commit the same crime upon the prosecuting witness may be shown, if such evidence sheds any light upon

shooting an individual. For the purpose of proving that the shooting was not accidental, where such a fact is claimed, evidence may be given of efforts, or even threats, made by the defendant to shoot the same individual on prior occasions. Thus, the probability of the shooting being accidental is lessened by showing prior efforts or threats to accomplish the same act for which the prisoner is on trial. Cases of embezzlement, and of obtaining money or other property by false pretenses, come under the same general rule. A man indicted for the embezzlement of funds by false entries might claim, with some degree of plausibility, perhaps, that the entry was a mistake; but the probability of such mistake would be greatly lessened by proof that other false entries of the same kind had been made at about the same time by the same person. Then there is another class of cases in which the facts show the commission of two crimes, and that the individual who committed the other crime also committed the one for which the prisoner is on trial. Evidence is then permitted to show that the person was the person who committed the other crime, because in so doing, under the circumstances, and from the connection of the prisoner with the other crime, the evidence of his guilt of such other crime is direct evidence of his guilt of the crime for which he is on trial. Another class in which evidence of this nature is admissible is where it is proper for the purpose of showing a motive for the commission of the main crime. * * * Under such conditions, and guided by such rules, it does not seem to me that this evi-

dence by Pottle was so connected legitimately with the main transaction—that of the alleged bribery of Fullgraff—as in any way to characterize the intent with which the money was alleged to have been paid Fullgraff, in any other sense than the evidence tended to show capacity upon the part of the prisoner to commit the crime because he had, months before, attempted to commit one of a similar nature with another person for the purpose of accomplishing another act. It is a very general, and extremely broad, and I think, a dangerous ground upon which to claim the admissibility of evidence of this character, to say that it tends to show that the prisoner was so desirous of obtaining a railroad on Broadway that he was willing to commit a crime for the purpose of securing his object. It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. To adopt so broad a ground, for the purpose of letting in evidence of the commission of another crime, is, I think, of a very dangerous tendency. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it can not be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence. I do not think that evidence of the kind in question,

any element of the crime charged.¹ In a prosecution for rape, in Alabama,² it was held that the defendant's prior declaration of his having a carnal passion for the woman was admissible, on much the same principle as the prior threats of a defendant are admissible in a prosecution for murder.³ If an extraneous crime is involved within the *res gestæ*, it is not to be excluded because it is extraneous.⁴ A series of mutually dependent

and in such a case as is here presented, legitimately tends to enlighten a jury upon the subject of the intent with which money was paid many months thereafter to another person at a different place, and to accomplish the commission of another act. It throws light upon that intent only as it tends to show a moral capacity to commit a crime. It gives, under the circumstances, entirely too wide an opportunity for the conviction of an accused person by prejudice instead of by evidence showing the actual commission of the crime for which the defendant is on trial."

¹ *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. Rep. 880, 58 Am. Rep. 530, and cases cited; *Com. v. Jackson*, 132 Mass. 16; *State v. Ward*, 61 Vt. 153, 17 Atl. Rep. 483. In *Proper v. State*, 85 Wis. 615, 55 N. W. Rep. 1035, which was a prosecution for rape, it was held competent for the state to prove that prior to the time in question the defendant had entered the bed where the prosecutrix and another woman were sleeping, and had had intercourse with the latter. The ruling was put on the ground that as proof of prior assaults on the prosecutrix were admissible, so it was competent to show the defendant's act in entering her bed, as the act was one of gross indecency, amounting to an assault upon her. In *Scott v. People*, 141 Ill. 195, 30 N. E. Rep. 329, where the defendant was charged with the commission of an

abortion, it was held that evidence of his prior attempts to commit an abortion on the same woman, during the same pregnancy, were admissible, as the evidence tended to show his knowledge of the woman's condition, and his intent to commit an abortion upon her. *Lamb v. State*, 66 Me. 287, 7 Atl. Rep. 399; *State v. Ward*, 61 Vt. 153, 17 Atl. Rep. 483. "However extreme the case may be, I think it will be found that the courts have always professed to put the admissibility of the testimony on the ground that there was some logical connection between the crime proposed to be proved, other than the tendency to commit one crime as manifested by the tendency to commit the other." *Rapello, J.*, in *State v. Lapage*, 57 N. H. 245, 295, 24 Am. Rep. 69. "There must be in the transaction thus sought to be proved some relation to, or connection with, the main transaction; that is, they must show a common motive or intent running through all the transactions, or they must be such as in their nature show guilty knowledge at the time of the main transaction." *Mayer v. People*, 80 N. Y. 364, and note.

² *Barnes v. State*, 88 Ala. 204, 7 So. Rep. 38, 16 Am. St. Rep. 48.

³ To the same effect, *Warwick v. Elsey*, 47 Mich. 10, 10 N. W. Rep. 57.

⁴ *Post*, chap. 9, and see *Farris v. People*, 129 Ill. 521, 21 N. E. Rep. 821, 16 Am. St. Rep. 283, a case which contains a valuable discussion

crimes may be shown where they tend to prove that they were committed under a system which is relevant to the inquiry.¹ Collateral crimes may be shown where they tend to prove malice, guilty knowledge, intent, motive or the like, if such element enters into the offense charged.² Conspiracy cases fur-

of this subject, even if the conclusion reached by a majority of the court is of doubtful correctness.

¹ *Frazier v. State*, 135 Ind. 38, 34 N. E. Rep. 817; *State v. Witham*, 72 Me. 531; *People v. Bidleman*, 104 Cal. 608, 38 Pac. Rep. 502; *Card v. State*, 109 Ind. 415, 9 N. E. Rep. 591; *State v. Jamison*, 74 Iowa 613, 38 N. W. Rep. 509; *People v. Hawkins*, (Mich.) 64 N. W. Rep. 736; *Com. v. Shepherd*, 1 Allen 575; *State v. Lewis*, 19 Ore. 478, 24 Pac. Rep. 914; *People v. Kemp*, 76 Mich. 410, 43 N. W. Rep. 439; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. Rep. 62; *Costello v. Crowell*, 139 Mass. 588, 22 N. E. Rep. 698; *Pennsylvania Co. for Ins. v. Phila., etc., R. Co.*, 153 Pa. St. 160, 25 Atl. Rep. 1043.

² *State v. Palmer*, 65 N. H. 216, 20 Atl. Rep. 6; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *Com. v. McCarthy*, 119 Mass. 354; *State v. Witham*, 72 Me. 531, and cases cited in last note. Where the defendant was charged with frequenting a gaming house for the purpose of gaming, it was held proper to prove that defendant was accustomed to visit like places for like purposes. *Courtney v. State*, 5 Ind. App. 356, 32 N. E. Rep. 335. In *Barton v. State*, 28 Tex. App. 483, 13 S. W. Rep. 783, the defendant was charged with wilfully placing an obstruction upon a railroad track. Evidence was held competent that on the same night, and upon the same railroad track, the defendant placed another obstruction. A prior assault, in which an effort was made to com-

mit sodomy, may be shown as bearing on the intent which prompted an assault upon the same person. *State v. Place*, 5 Wash. 773, 32 Pac. Rep. 736. On a charge of libel it is proper to give in evidence any words, as well as acts of the defendant, which show his *quo animo* in using the words charged (*Freeman v. Sanderson*, 123 Ind. 264, 24 N. E. Rep. 239; *Rustell v. Macquister*, 1 Camp. 49, n.), notwithstanding the fact that the statute of limitations has run as to the collateral words. *Evening Journal Ass'n v. McDermott*, 15 Vroom. (N. J. L.) 430, 43 Am. Rep. 392. See *Frazier v. McClaskey*, 60 N. Y. 337, 19 Am. Rep. 193. In *Com. v. Johnson*, 150 Mass. 54, 22 N. E. Rep. 82, the defendant was charged with the larceny of certain sheep. It was held that it was proper to show that other sheep, not alleged to have been stolen, identified by peculiar markings as belonging to the fold of the prosecuting witness, were among the sheep claimed to have been stolen, as such evidence tended to identify them. See, also, *People v. Cunningham*, 66 Cal. 668, 6 Pac. Rep. 700; *Roblis Case*, 34 Cal. 591; *Turner v. State*, 102 Ind. 425, 1 N. E. Rep. 869; *Webb v. State*, 8 Tex. App. 115. In *People v. Murphy*, 135 N. Y. 450, 32 N. E. Rep. 138, the charge was arson. The building burned was a barn. The defendant had been a coachman in the employ of the prosecuting witness. There was evidence tending to show threats made by the defendant against the former. It was held proper to prove that on the night of the

nish a common illustration of this doctrine.¹ In prosecutions for forgery and counterfeiting, previous utterings may be shown to prove guilty knowledge.² Other instances of receiving stolen goods may be shown.³ The philosophy of the doctrine of the admissibility of proof of collateral crimes is the same as the proof of relevant innocent circumstances. "It frequently happens," says Brockenborough, J.,⁴ "that as the evidence of circumstances must be resorted to for the purpose of proving the commission of the particular offense charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases it is proper that the chain of circumstances should remain unbroken. If one or more links of that chain consist of circumstances which tend to prove the prisoner has been guilty of other crimes than charged, this is no reason why the court should exclude those circumstances. They are so intimately connected and blended with the main facts adduced in evidence that they can not be

burning the horses were poisoned by "London Purple"; that such poison was kept in a cupboard of the barn (showing that the act was done by a person familiar with the premises), and that on the same night the carriage was hacked and the curtains and cushions cut. In another arson case it was held proper to prove that the defendant poisoned the dog of the prosecuting witness the night the crime was committed, as it tended to show malice or a purpose to prevent an alarm. *State v. Hallack*, 65 Wis. 147, 26 N. W. Rep. 572.

¹ See *Gallagher v. State*, 101 Ind. 411.

² *United States v. Craig*, 4 Wash. C. C. 729; *Com. v. Stearns*, 10 Met. 256; *Com. v. Shephard*, 1 Allen 575; *Com. v. Edgerly*, 10 Allen 184; *People v. Everhardt*, 104 N. Y. 591, 11 N. E. Rep. 62; *Penn. Co. for Ins. v. Phil.*, etc., R. Co., 153 Pa. St. 160, 25 Atl. Rep. 1043; *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510; *Bersch v. State*,

13 Ind. 434, 74 Am. Dec. 263; *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292; *People v. Kemp*, 76 Mich. 410, 43 N. W. Rep. 439; *People v. Hawkins*, (Mich.) 64 N. W. Rep. 736; *State v. Jamison*, 74 Iowa 613, 38 N. W. Rep. 509; *State v. Lewis*, 19 Ore. 478, 24 Pac. Rep. 914; *Steele v. People*, 45 Ill. 152; *Wash. v. Com.*, 16 Grat. 530; *State v. Williams*, 2 Rich. 418, 45 Am. Dec. 741; *Reed v. State*, 15 Ohio 217; *Mason v. State*, 42 Ala. 532; *Peek v. State*, 2 Humph. 78; *People v. Frank*, 28 Cal. 507.

³ *People v. Rando*, 3 Park. Cr. R. 335; *Shriedley v. State*, 23 Ohio St. 130; *Yarborough v. State*, 41 Ala. 405; *Devoto v. Com.*, 3 Met. (Ky.) 417, and see *Turner v. State*, 102 Ind. 425; *Goodman v. State*, 141 Ind. 35, 39 N. E. Rep. 939. But evidence is not competent, tending to prove other thefts by the principal, where the prosecution is against an alleged accessory. *McIntyre v. State*, 10 Ind. 28.

⁴ *Walker v. Com.*, 1 Leigh 574.

departed from with propriety, and there is no reason why the criminality of such intimate and connected circumstances should exclude them, more than other facts apparently innocent.”¹ At this point it is well to call attention to the admonition of Agnew, J., in a Pennsylvania case.² The learned judge says: “If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt.”³

§ 58. **Sexual relations.**—Where the question at issue is as to the existence of a criminal intimacy at a certain time, evidence of prior acts of indecent familiarity are competent, as tending to show an antecedent probability. As stated by the Supreme Court of Massachusetts,⁴ such evidence “would have a tendency to prove, in the case of the same woman, of course, a breaking down of all the safeguards of self-respect and modesty, and a gradual preparation of the woman to lend herself to the commission of the crime.”⁵ It was held in an

¹ See, also, *Com. v. Ferrigan*, 44 Pa. St. 386; *Bergoff v. State*, 25 Neb. 213, 41 N. W. Rep. 136. In *Garlitz v. State*, 71 Md. 293, 18 Atl. Rep. 39, the defendant was charged with the murder of his wife. He testified that he killed her under the influence of a provocation created by her confession of infidelity. Held, that it was competent to ask him, on cross-examination, if he was not at the time maintaining criminal relations with another woman, as tending to show his lack of appreciation of the sanctity of the marital relation and the improbability that he was shocked and overcome, as described by his testimony in chief.

² *Shaffner v. Com.*, 72 Pa. St. 60, 18 Am. Rep. 649.

³ See also, as supporting this view, *State v. Lapage*, 57 N. H. 245, 24 Am. 6—Ev.

Rep. 69; *People v. Lane*, 101 Cal. 513, 34 Pac. Rep. 856. In the Pennsylvania case quoted from above the defendant was charged with murdering his wife by poison. He was criminally intimate with the wife of S. The court held that it was not proper to prove that S. died; that the defendant attended upon him during his last sickness; that S. had the same symptoms as defendant's wife, and that upon the death of S. the defendant sought to collect his insurance.

⁴ *Com. v. Bradford*, 126 Mass. 42.

⁵ To the same effect, *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *People v. Davis*, 52 Mich. 569, 18 N. W. Rep. 362; *Hall v. People*, 47 Mich. 636, 11 N. W. Rep. 414; *Sullivan v. Hurley*, 147 Mass. 387, 18 N. E. Rep. 3; *Com. v. Durfee*, 100 Mass. 146; *Thayer v. Thayer*, 101 Mass. 111, 100 Am. Dec. 110; *Com. v. Nichols*, 114 Mass.

early Indiana case¹ that subsequent acts of sexual intercourse could not be shown, but the weight of authority is against this proposition.² In a Tennessee case³ it was said: "The whole of defendant's intercourse with the seduced, and all the circumstances connected with it, are to be regarded as one entire transaction."

§ 59. **Collateral evidence to show motive.**—There may be a conviction for crime although no motive for its commission is shown to exist.⁴ Very few crimes are motiveless, however. As has been observed, "in looking at the motives which instigate human conduct we ascend to the very origin of crime."⁵ Among the circumstances which may be judicially considered as leading to important and well-grounded presumptions are "motives to crime, declarations or acts indicative of guilty consciousness or intention, and preparations for the commission of crime."⁶ The prosecution is entitled to put in evidence circumstances which suggest a possible motive on the part of the defendant, although there is no direct evidence that he was acting on such motive.⁷ In a Vermont case,⁸ where the defendant was charged with arson, it was held permissible to prove that the defendant had been de-

285, 19 Am. Rep. 346. *Contra*, State v. Bonsor, 49 Kan. 758, 31 Pac. Rep. 736. It was held in a prosecution for incest that acts of sexual intercourse between the parties occurring eight years before might be shown. People v. Skutt, 96 Mich. 449, 56 N. W. Rep. 11. See State v. Borie, 79 Iowa 605, 44 N. W. Rep. 824, as cited *ante*, § 54. The court may exercise a reasonable discretion as to the limits of time. Francis v. Rosa, 151 Mass. 532, 24 N. E. Rep. 1024.

¹ Lovell v. State, 12 Ind. 18.

² Russell v. Chambers, 31 Minn. 54, 16 N. W. Rep. 458; Stewart v. State, 64 Miss. 626, 2 So. Rep. 73; State v. Witham, 72 Me. 531.

³ Thompson v. Clendening, 1 Head 287.

⁴ Wills Circ. Ev., 41; Goodwin v. State, 96 Ind. 550; Stitz v. State, 104 Ind. 359, 4 N. E. Rep. 145.

⁵ Burr. Circ. Ev., 281. As said in State v. Palmer, 65 N. H. 216, 20 Atl. Rep. 6, "the natural and logical course of human thought, when a crime has been committed, is to inquire what motive could have influenced a sane person to do such an act."

⁶ Wills on Circ. Ev., 39; Carlton v. People, 150 Ill. 181, 37 N. E. Rep. 244, 41 Am. St. Rep. 346.

⁷ Somerville v. State, 6 Tex. App. 433.

⁸ State v. Ward, 61 Vt. 153, 17 Atl. Rep. 483.

sirous of marrying the daughter of the person whose building had been burned, and that through the influence of her parents their relations had been broken off.¹ It has been held competent in a number of cases, where defendants have been on trial for uxoricide, to show their criminal relations with other women, in order to rebut the natural presumption against a husband committing such a crime, by showing the alienation of his affections and to suggest a possible reason for his desiring his consort's death.² Evidence of prior ill-will, as manifested by threats or otherwise, is, of course, competent in cases where it can be claimed that malice prompted the act. The defendant may show in such a case his prior expressions of good-will towards the deceased or injured party.³

§ 60. Facts necessary to explain or introduce relevant facts.

—Article 9 of Sir James Stephen's Digest of the Law of Evidence, is as follows: "Facts necessary to be known to explain or introduce a fact in issue, or relevant, or deemed to be relevant, to the issue, or which support or rebut an inference suggested by any such fact, or which establish the identity of anything or person where identity is in issue, or is, or is deemed to be, relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively."⁴

¹ Where a defendant is charged with burning his own property to defraud an insurance company, the fact of an overvaluation may be shown. *Com. v. Hudson*, 97 Mass. 565; *Shepherd v. People*, 19 N. Y. 537; *Stitz v. State*, 104 Ind. 359, 4 N. E. Rep. 145.

² *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712; *State v. Kinkle*, 6 Iowa 380; *Duncan v. State*, 88 Ala. 31, 7 So. Rep. 104. The fact as to the existence

of a criminal intimacy between the defendant and the wife of the deceased at the time of the killing is competent to show motive. *Bateman v. State*, 64 Miss. 233, 1 So. Rep. 172; *State v. Kline*, 54 Iowa 183, 6 N. W. Rep. 184.

³ 1 Whart. Cr. L., § 635.

⁴ It is competent for a person suing for a physical injury to explain the adverse inference which might be

§ 61. **Particular instances to rebut evidence.**—While, as we have already seen,¹ it is not competent for the party calling an expert to show by him particular instances in his own experience confirming or tending to confirm, the opinion he has expressed, for the reason that such evidence would be collateral, yet the opposite party may introduce evidence of particular instances opposed to such opinion, for the reason that such evidence tends to overthrow the opinion.² In a

drawn from his failure to procure medical treatment, by stating that he was without means. *St. Louis, etc., R. Co. v. Jones*, (Tex.) 14 S. W. Rep. 309. To the same effect in principle, where there was a failure to complain, see *State v. Wilkins*, 66 Vt. 1, 28 Atl. Rep. 323; *Macy v. St. Paul, etc., R. Co.*, 35 Minn. 200, 28 N. W. Rep. 249. Where a defendant was sued as a partner, and the plaintiff had introduced evidence of certain acts done by the defendant from which an inference that he was a partner might be drawn, it was held—the acts not amounting to an estoppel—that he might explain that his alleged partners were his relatives and that his purpose was to assist them. *Tracy v. McManus*, 58 N. Y. 257. In *Thompson v. Yazoo, etc., R. Co.*, 72 Miss. 715, 17 So. Rep. 229, where a suit was brought for an injury to a trespassing boy, received while alighting from a moving train, and the evidence showed that the conductor had compelled the boy to get off, by a command to that effect, it was held competent for the defendant to show that the conductor knew of the boy's habit of jumping on and off cars while in motion, as such evidence bore on the conductor's knowledge of the boy's agility. Where a suit was brought to recover for a personal injury occurring at a manufacturing plant, it was held that it was competent to show

the general character of the plant, as a part of the surroundings or *res gestæ*. *Citizens' G. L. & H. Co. v. O'Brien*, 118 Ill. 174, 8 N. E. Rep. 310. On an issue as to whether the plaintiff's barn was blown down by a tornado, it was held that evidence was proper that other buildings in the immediate neighborhood were destroyed at the time. *Poggensee v. Mut. Fire, L. & F. Ins. Co.*, 69 Iowa 157, 28 N. W. Rep. 485, 58 Am. Rep. 215. In *Sanderson v. Frazier*, 8 Colo. 79, 5 Pac. Rep. 632, 54 Am. Rep. 544, the fact was that a person was injured by a stage coach tipping over. The court on appeal held that it was competent to prove that at another point the coach got outside of the road and into a gully, made by a washout, in order to show the degree of darkness of the road and the consequent necessity for proper lights upon the vehicle. Where a sleeping car company was sued for the value of property stolen from a passenger upon one of its cars, during the night time, it was held competent to prove the fact that two other larcenies occurred on the car that night, as such evidence tended to show the porter's lack of watchfulness. *Lewis v. New York, etc., Co.*, 143 Mass. 267, 9 N. E. Rep. 615, 58 Am. Rep. 135.

¹ *Ante*, § 56, note.

² *Stephen's Dig. Law of Ev.*, Art. 50.

Massachusetts case,¹ the defendant was charged with producing an abortion on the person of another. The prosecution introduced expert evidence that no woman could introduce a "sea tangled tent" into her uterus. It was held proper for the defendant to prove by a witness that she had introduced one into her own uterus. In another Massachusetts case, the question arose upon the trial as to whether a certain gas-burner was burning at the time of the accident, which was the subject of the inquiry. A witness testified that the burner was lit at the time, but on cross-examination it turned out that the testimony of the witness was based on what he claimed was the custom of the defendant company to light the burner every night. A witness was called who testified that on certain other nights the burner was not lit. The court held that as the evidence had a tendency to contradict the other witness it was properly admitted.²

§ 62. **Evidence of other defects in negligence cases.**—Where a city is sued for an injury charged to have occurred by reason of its having negligently permitted a sidewalk to remain out of repair, it is entirely clear that to introduce proof that the city permitted its other sidewalks to remain out of repair would be to raise a collateral issue. But if, for instance, the defect complained of was but one of a large number of like defects, caused by the sidewalk, as a whole, becoming worn out, then it is plain that evidence of the general condition of the sidewalk in the vicinity of the accident would be competent, for the reason that the jury would much more readily presume, if such was the case, that the city had notice as to the condition of the sidewalk.³ Whether other defects can be shown where the ele-

¹ *Com. v. Leach*, 156 Mass. 99, 30 N. E. Rep. 163.

² *Wentworth v. Eastern R. Co.*, 143 Mass. 248, 9 N. E. Rep. 563.

³ *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Dubois v. City of Kingston*, 102 N. Y. 219, 6 N. E. Rep. 273, 55 Am. Rep. 804; *District of Columbia v. Arms*, 107 U. S. 519, 2 Sup. Ct.

Rep. 840; *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743, 57 Am. Rep. 82; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. Rep. 977; *Richards v. City of Oshkosh*, 81 Wis. 226, 51 N. W. Rep. 256; *Barrett v. Village of Hammond*, 87 Wis. 654, 58 N. W. Rep. 1053; *Bur-*

ment of notice is not involved, is a question upon which the authorities do not entirely agree. In an Indiana case,¹ where the defendant was charged with negligence in permitting a rotten telegraph pole to stand, which subsequently fell upon plaintiff and injured him, it was held error to permit a witness to testify that poles in the same line forty to sixty rods away from the place of the accident were also defective. The court said: "The character, kind, or condition of poles other than those which fell were matters in themselves wholly immaterial to the question in controversy. Nor could it be inferred from that fact alone that the poles which fell were rotten and unsafe. The proof of the one proposition does not even tend to prove the other. If, in connection with this evidence, there had been an offer to show that the poles alluded to by the witness and those which fell were all of one kind, and put up at the same time, and equally exposed to the elements, the evidence might have been competent, inasmuch as it might be inferred that like causes would equally affect like matters. But no such connecting evidence was offered." Other authorities seem to support the intimation of this case. Such objects as sidewalks, railroad tracks and many other physical objects are units, and it is proper to examine the unit at points but a short distance from the place of the accident, provided always—and here great discrimination is necessary—that the points of comparison are so situated that it may be properly presumed that like conditions obtained. A case which is clearly within this principle is reported in Colorado,² where part of the roof of a mine fell in, under circumstances rendering it impossible to determine what its condition had theretofore been, and it was held, the prior condition of the roof being in issue, that

rows *v. Village of Lake Crystal*, 61 Minn. 357, 63 N. W. Rep. 745; *Munger v. City of Waterloo*, 83 Iowa 559, 49 N. W. Rep. 1028; *Smith v. City of Des Moines*, 84 Iowa 685, 51 N. W. Rep. 77; *Aryman v. City of Marshalltown*, 90 Iowa 350, 57 N. W. Rep. 867; *Strudgeon v. Village of Sand Beach*, (Mich.) 65 N. W. Rep. 616; *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722, 30 Am. St. Rep. 65. But it is held in *McConnell v. City of Osage*, 80 Iowa 293, 45 N. W. Rep. 550, that such evidence is not admissible, where the defect is not a part of a general condition.

¹ *Western Union Telegraph Co. v. Levi*, 47 Ind. 552.

² *Sampson Mining and Milling Co. v. Schaad*, 15 Colo. 197, 25 Pac. Rep. 89.

evidence was competent as to the condition of the portions of the roof which had not fallen. In an Indiana case,¹ the plaintiff sued for injuries caused by a defective sewer. It was held proper to prove that there was a break in the sewer at a point about one hundred feet from the break which occasioned the injury. The court said: "This evidence was competent, in connection with other testimony in the case, for the purpose of charging the city with knowledge, as well as for the purpose of showing that the materials used were defective, or the work of construction was not well done, and also for the purpose of showing that the sewer had, by reason of time and use, got out of repair." In a Kentucky case,² the supreme court of that state, in a case involving the general question here under discussion, said: "It is true that a rotten tie one hundred feet distant from where the train was derailed could not have caused the accident, but when one side—the plaintiff—shows that the ties were rotten at the place, and the defendant that they were sound, the defective or sound condition of the ties within one hundred feet on each side of the place of the accident, or from a particular distance, would, to some extent, tend to corroborate the statement of the one side or the other." The cases of *Vicksburg, etc., R. Co. v. Putnam*,³ and *Sidekum v. Wabash, etc., R. Co.*,⁴ bear out this general view.

§ 63. **Proof of prior injury at same place.**—There is but little dispute among the authorities that it is competent, where the question of notice to the defendant is an element in the case, to show a prior serious injury at the place where the injury complained of occurred, as the fact of such prior injury tends, at least, to give a notoriety to the place, and therefore tends to prove notice.⁵ The competency of such evidence may

¹ *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743, 57 Am. R. 82. Rep. 549. *Contra*, *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am.

² *Ohio Valley Ry. Co. v. Watson's Admr.*, 93 Ky. 654, 21 S. W. Rep. 244, 40 Am. St. Rep. 211. Rep. 321; *Dundas v. City of Lansing*, 75 Mich. 499, 42 N. W. Rep. 1011, 13 Am. St. Rep. 457.

³ *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545, 7 Sup. Ct. Rep. 1. ⁵ *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *Kent v. Town of*

⁴ *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 400, 4 S. W. Rep. 701, 3 Am. St. Rep. 591; *Quinlan v. City of Utica*, 11 Hun 217; *Toledo, etc., R.*

be claimed in some instances on the ground that it is a circumstance tending to show the long continuance of the defect.¹ It is believed that, in many cases, at least, evidence of the fact of a prior accident at the same place, if it occurred under the same circumstances as the injury complained of, is competent for the purpose of showing, in an experimental way, the character of such defect. Such evidence finds a very close analogy in evidence of experiments, a subject which will be treated of in a subsequent portion of this chapter. As was said by the Supreme Court of the United States:² "Persons are not wont to seek such places, and do not willingly fall into them." The New York Court of Appeals has said³ that proof of the happening of a prior accident "is competent upon the ground that it tends to show that, tested by actual use, the place of the accident has been demonstrated to be unsafe and dangerous."⁴ This doctrine has been applied to cases where persons, driving upon a street or highway, have been injured by a defect in the way, as the fact of prior accidents tends to show the unfitness of the way for public travel.⁵ Authority to the contrary is not want-

Co. v. Milligan, 2 Ind. App. 578, 28 N. E. Rep. 1019; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. Rep. 743, 59 N. E. Rep. 82; *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *Richards v. City of Oshkosh*, 81 Wis. 226, 51 N. W. Rep. 256; *Burrows v. Village of Lake Crystal*, 61 Minn. 357, 63 N. W. Rep. 745; *City of Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418; *Hill v. Portland, etc., R. Co.*, 55 Me. 438, 92 Am. Dec. 601; *House v. Metcalf*, 27 Conn. 631; *City of Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95. *Contra*, *Hudson v. Chicago, etc., R. Co.*, 59 Iowa 581, 13 N. W. Rep. 735, 44 Am. Rep. 692; *Mathews v. City of Cedar Rapids*, 80 Iowa 459, 45 N. W. Rep. 894, 20 Am. St. Rep. 436.

¹ *Alberts v. Village of Vernon*, 96 Mich. 549, 55 N. W. Rep. 1022.

² *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. Rep. 840.

³ *Brady v. Manhattan R. Co.*, 127 N. Y. 46, 27 N. E. Rep. 368.

⁴ In this case it was charged that the accident occurred to plaintiff, who was leaving an elevated railroad car, by reason of there being too wide a space between the platform of the car and the platform of the station, and the court intimates that evidence of prior accidents from the same cause at other stations along the defendant's line would have been competent, if there had been evidence that all the conditions were alike. See further as supporting the text, *Missouri, etc., R. Co. v. Neiswanger*, 41 Kan. 621, 21 Pac. Rep. 582, 13 Am. Rep. 304; *City of Junction City v. Blades*, 1 Kan. App. 85, 41 Pac. Rep. 677.

⁵ *Kent v. Town of Lincoln*, 32 Vt. 591; *Quinlan v. City of Utica*, 11 Hun 217; *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465, 16 N. W. Rep. 358. In *Calkins v. City of Hartford*, 33 Conn. 57, 87 Am. Dec. 194, it is said: "One of the most satisfactory kinds of evidence is that which is founded on the natural

ing, however.¹ The argument of the authorities adopting this view is voiced by the opinion of Cole, C. J., in a Wisconsin case,² in which it is said: "It is apparent that if this testimony was relevant to prove a defect, it would have been competent to show that these persons were not driving carefully, or had skittish teams; also that hundreds had passed over this highway in safety with carriages, notwithstanding the alleged defect. So, issue after issue would be raised, and facts collateral to the issue made by the pleadings would multiply; the main issue forming new ones, and the suit itself expanding like the banyan tree of India, whose branches drop shoots to the ground, which take root, and form new stocks, till the tree itself covers great space by its circumference. We think it a much safer rule to confine the evidence to the issue or real fact put in controversy by the pleadings, excluding all evidence which relates to collateral matters." The writer has already stated that he believes the other line of cases state the law correctly. The case just quoted from emphasizes the consideration of convenience in excluding the testimony. But this argument does not

relation of the cause and effect as ascertained by observation and experience. The plaintiff founded her claim upon the result of the common experience of mankind; that a glade of ice usually causes any person passing over it to slip. If she could succeed in satisfying a jury that there was a formation of ice of the description claimed, she would make out a *prima facie* case that the sidewalk was dangerous, not from the single fact that she slipped, but from the fact established by the common experience of mankind, that every person crossing such a formation in its primary condition would be liable to slip. * * * We have been asked whether the fact that a number of persons passed in safety over a bridge in which it was claimed there was a dangerous hole would be admissible to prove that there was no hole, or, if there was,

that it was not dangerous. It is unnecessary to answer that question. Many persons might cross the bridge without passing over the hole. If the claim was that a plank reaching the whole width of the bridge was gone, it would bear a stronger resemblance to the present case. Here all who crossed over that sidewalk must have either stepped upon the ice or have taken an unusual stride to step over it. Their attention would necessarily have been drawn to it."

¹ *Branch v. Libbey*, 78 Me. 321, 57 Am. Rep. 810, and cases there cited; *Ramsey v. Rushville & M. Gravel Road Co.*, 81 Ind. 394; *Richards v. City of Oshkosh*, 226 Wis. 81, 51 N. W. Rep. 256; *Collins v. Inhabitants of Dorchester*, 6 Cush. 396; *Elliott on Roads and Streets*, 643, 646, 647.

² *Phillips v. Town of Willow*, 70 Wis. 6, 34 N. W. Rep. 731, 6 Am. St. Rep. 114.

afford a sufficient reason for excluding testimony which directly tends to prove or disprove the issue. It is true that the opposite party may not be prepared with evidence upon the particular subject, and that the jury may be carried somewhat afield in its investigation, but these are surely insufficient objections to the hearing of relevant evidence. This entire chapter is devoted to the competency of relevant collateral evidence, and the writer's position is supported by analogies found in many of the adjudications considered in other sub-heads in this chapter, and particularly by the cases in the next section.

§ 64. **Accidents, or non-happening of, showing how contrivance served.**—The law upon this subject is thus stated in an Indiana case:¹ "Where the question is as to the safety or availability of a machine or contrivance designed for a particular purpose, or for practical use, evidence is admissible to show how the thing served when put to the use for which it was designed, in the one case, or that occurrences of a character to make the defect or incompetency notorious had taken place, in the other." In an Illinois case,² where two spouts, which were used in conducting water to a watering trough, were constructed in such manner that the spouts operated as hooks which might catch the bridles of horses, it was held that evidence of other like accidents was competent, as tending to show that the common cause of the accidents was a dangerous thing. "When an issue is made," the court in that case said, "as to the safety of any machinery or work of man's construction, which is for practical use, the manner in which it has served that purpose when put to that use" is a matter material to the issue. *Findlay Brewing Co. v. Bauer*³ is a well-considered case on this subject. In that case the facts

¹ *Cleveland, etc., R. Co. v. Wynant*, 114 Ind. 525, 17 N. E. Rep. 118, 5 Am. St. Rep. 644.

² *City of Bloomington v. Legg*, 151 Ill. 9, 37 N. E. Rep. 696.

³ *Findlay Brewing Co. v. Bauer*, 50 Ohio 560, 35 N. E. Rep. 55. In *Hudson v. Chicago, etc., R. Co.*, 59 Iowa 581, 13 N. W. Rep. 735, 44 Am. R. 692, where

the plaintiff's horse was injured by catching its foot in the planking of a railroad crossing, it was held that evidence of a prior like accident to another horse was incompetent. This case was followed, but doubted, in *Mathews v. City of Cedar Rapids*, 80 Iowa 459, 45 N. W. Rep. 894, 20 Am. St. Rep. 436.

were that the plaintiff was injured in the use of a lift, used for the purpose of elevating barrels and similar packages to an upper floor. A barrel, which plaintiff was raising, slipped from the hooks and fell, striking his hand. The question was presented as to whether evidence was competent of other like prior occurrences in the use of lift, while others were operating it. The court said: "The authorities on the question are conflicting. The courts of Massachusetts and some of the other states hold that such evidence is not within the issue, but collateral to it, and should be rejected.¹ But reason and the weight of authority are the other way. * * * On reason, it seems plain that evidence as to how this lift or elevator behaved on former occasions—that at other times, when being operated by other persons, barrels being lifted had fallen back, the conditions remaining substantially the same—tended to prove some dangerous vice in its construction that rendered its operation dangerous, and that the company knew, or should have known, the fact. Inspection itself may indicate some defect in a machine, affecting its safety or usefulness; but, as is most usually the case, its defective character, whatever it may be, is more clearly observed in its operation. Experiment is the final and most conclusive test of its safety, as well as of its usefulness; and the fact that the carefulness of the party operating the machine may be involved in each instance may affect the weight of the evidence but not its admissibility." In a New York case,² the defendant railway company was charged with negligently maintaining a defective highway crossing, which, it was alleged, caused the plaintiff's wagon to tip over. It was held that evidence was competent, on behalf of the defendant, as to the tipping over of plaintiff's wagon, one day after the accident. The court said: "The defendant was entitled to show the defect of the wagon in respect to the bolster and hound, and that such defect tended in theory, and operated in practice, to overturn the wagon." The court further stated

¹ *Collins v. Dorchester*, 6 Cush. 396; *Aldrich v. Peckham*, 1 Gray 510; *Phillips v. Town of Willow*, 70 Wis. 6, 5 Am. St. R. 114. ² *Hoyt v. New York, etc., R. Co.*, 118 N. Y. 399, 23 N. E. Rep. 565.

that this doctrine is in line with a class of cases holding that where a defect is shown to exist, that fact may be legitimately strengthened by proof of other similar occurrences, both before and after the occurrence which forms the subject of the trial.¹ In a Minnesota case,² the question at issue was as to whether a switch was so defective that it caused a locomotive to leave the track. Evidence was held competent that other locomotives had left the track at that point. The court put its ruling on the ground that the evidence was equivalent to testimony as to the result of experiments. Among other things, the court said: "Upon any issue as to the condition or safety of any work of human construction designed for practical use, evidence showing how it has served, when put to the uses for which it was designed, would seem to bear directly upon the issue." Within the principle of the above rulings would seem to be a further proposition that where the appliance has long been used, under circumstances calculated to fully test its availability to the use to which it is subject, and no accident has ever occurred on account of it, such fact is evidence tending to prove that it does not possess an inherent defect in the manner of its construction.³ Where the question is as to

¹ See, also, *Wooley v. Railroad Co.*, 83 N.Y. 121; *Phelps v. Railroad*, 37 Minn. 485, 35 N. W. Rep. 273, 5 Am. St. Rep. 867; *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *Colorado, M. & I. Co. v. Rees*, 21 Colo. 435, 42 Pac. Rep. 42.

² *Morse v. Minneapolis, etc., R. Co.*, 30 Minn. 465, 16 N. W. Rep. 358. In *Dye v. Delaware, etc., R. Co.*, 130 N.Y. 671, 29 N. E. Rep. 320, where the plaintiff, a brakeman in defendant's employ, was injured by being caught between the dead-woods of two cars, such dead-woods being of unequal height, so that they would overlap, and where the defendant had fully admitted that said cars, and the others in its service, were constructed without reference to uniformity in that respect, but grounded its defense

upon the position that the injury was the result of one of the assumed perils of the service, it was held improper to permit the plaintiff to introduce evidence showing the injury of other brakemen by being caught in the same manner between other cars.

³ Where plaintiff's wagon was overturned, as he claimed, by the faulty construction of defendant's railway at a highway crossing, it was held that defendant might prove that vehicles constantly passed over the track at that point without difficulty or hindrance. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. Rep. 525. In *Pueblo Building Co. v. Klein*, (Colo.) 38 Pac. Rep. 608, the plaintiff sued for an injury caused by a fall of defendant's elevator, the issue being

whether an object is calculated to frighten horses, it has been held, in Indiana, that evidence that other horses have been frightened by the same object is not competent.¹ A like ruling has been made in Iowa,² while the contrary has been held to be the law in Maine and New Hampshire.³ In the writer's opinion the Maine and New Hampshire cases were decided wrong. It is to be considered that where an inanimate object frightens a horse, the object is entirely passive; it is not put to any test; it is the animal alone which is tested, and it can not be affirmed, as is necessary to make the evidence competent, that there is any visible, open connection between the circumstance of one horse being frightened at one time and the circumstance of another horse being frightened at another time.

§ 65. Habits of animals.—Because it is a recognized fact that an animal which has formed a vicious habit is likely to persist

as to whether it was defective in its construction. Held, that the defendant might show that it had been much used for a considerable time, and that no one had been hurt in its use, in order to rebut any inference that it was defective in its construction. In *Sutton v. Town of Vernon*, 62 Conn. 1, 23 Atl. Rep. 1020, where the plaintiff sued for an injury sustained while traveling on a highway, the defendant tendered an instruction that where a highway had remained in the same condition for twenty years, and no accident has happened thereon, the jury might take that fact into consideration in determining the question of negligence. The supreme court held that the instruction was rightly refused, saying that to have made it relevant it must have appeared that the use and experience of others had been of a nature to have tested the alleged defect. The cases of *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262, and *Hodges v. Bearse*, 129 Ill. 87,

21 N. E. Rep. 613, are in conflict with the text. In *Aldrich v. Peckham*, 1 Gray 510, where the question was as to whether a traveled path was wide enough to permit two carriages to pass, it was held that evidence that other persons had passed in carriages without collision or accident was incompetent, as the question could have been determined by measuring. The tendency in Massachusetts is to hold evidence of the nature under discussion as collateral; but that court has not so held where the experience of all must be substantially the same. *Collins v. Dorchester*, 6 Cush. 396. See *Whitney v. Leominster*, 136 Mass. 25.

¹ *Cleveland, etc., Co. v. Wynant*, 114 Ind. 525, 17 N. E. Rep. 118, 5 Am. St. Rep. 644.

² *Hudson v. Railway Co.*, 59 Iowa 581, 13 N. W. Rep. 735, 44 Am. Rep. 692.

³ *Crocker v. McGregor*, 76 Me. 282, 49 Am. Rep. 611; *Lewis v. Eastern R. Co.*, 60 N. H. 187.

in it, the law permits evidence to be introduced, where the disposition of the animal is involved, of prior exhibitions of the same vicious habit, as bearing on its disposition at the time of the injury.¹ It is even held that, where an injury is alleged to have been occasioned by the act of an animal, it is competent to show like acts upon the animal's part subsequently, as such evidence may be regarded as tending to prove a continuance of the vicious habit.²

§ 66. Experiments.—Under certain circumstances, testimony as to the result of experiments may afford cogent evidence. Thus, for instance, if it should become material to determine whether there was at a certain time an unobstructed view from one point to another, the force of the testimony of persons who had made the experiment, and were able to state that the conditions were the same at the time in question as at the time when the experiment was made, would be at once recognized. To render evidence of an experiment admissible, it must appear that the experiment was made under substantially the same conditions as existed at the time the event the experiment is designed to illustrate took place, for otherwise the experiment, instead of aiding the jurors, would be likely to confuse and mislead them. It may be added also that the subject-matter of the experiment must be such that, if it be certain that the conditions which were material elements in the two occurrences were precisely similar, the experiment would amount to a practical demonstration as to the nature of the prior fact. Without this limitation upon the admissibility of experiments, such proof would, in many instances, be open to the objection that it amounted only to proof of a similar but wholly disconnected cir-

¹ *Whittier v. Town of Franklin*, 46 N. H. 23, 88 Am. Dec. 185; *Bailey v. Inhabitants of Belfast*, (Me.) 10 Atl. Rep. 452; *Maggi v. Cutts*, 123 Mass. 535; *Todd v. Inhabitants of Rowley*, 8 Allen 51; *Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45. See *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551.

² *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696; *Maggi v. Cutts*, 123 Mass. 535; *Todd v. Inhabitants of Rowley*, 8 Allen 51; *Kennon v. Gilmer*, 5 Mont. 257, 51 Am. Rep. 45.

cumstance.¹ Frequent observation of merely similar circumstances may equip the expert for the expression of an opinion, but, as we have already seen, evidence of merely isolated facts is collateral.² Before taking leave of the topic of experiments,

¹ *Com. v. Piper*, 120 Mass. 185; *Eidt v. Cutter*, 127 Mass. 522; *Lincoln v. Taunton, etc., Co.*, 9 Allen 181; *Yates v. People*, 32 N. Y. 509; *Com. v. Twitchell*, 1 Brewst. 551; *Sullivan v. Com.*, 93 Pa. St. 284; *Smith v. State*, 2 Ohio St. 511; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. Rep. 564; *Chicago, etc., R. Co. v. Champion*, 9 Ind. App. 510, 36 N. E. Rep. 221; *State v. Justus*, 11 Ore. 178, 8 Pac. Rep. 337, 50 Am. Rep. 470; *People v. Levine*, 85 Cal. 39, 22 Pac. Rep. 969. In a condemnation proceeding brought by an elevated railroad company, it was held proper to ask witnesses to state such observed facts as to the effect of the road on the business of another street, as to the darkening of windows thereon, as to interference with access to property, flickering of lights in rooms from passing trains, etc., *Drucker v. R. Co.*, 106 N. Y. 157, 12 N. E. Rep. 568, 60 Am. Rep. 437; *Doyle v. Manhattan R. Co.*, 128 N. Y. 488, 28 N. E. Rep. 425. In *Lake Erie, etc., R. Co. v. Mugg*, *supra*, there being some evidence of statements of a *res gestæ* character made by the deceased, who had been run over, to the effect that his boot froze to the rail, and that he was unable to pull his foot away, it was held that the trial court ruled correctly in excluding the evidence of a witness to the effect that on the day of the injury he experimented and proved that his foot stuck to the rail, inasmuch as there was no evidence that the conditions of warmth and moisture were the same. In *Yates v. People*, *supra*, there being no proof

of similar conditions, it was held improper to prove how far a certain street-lamp would shed light, by evidence of an experiment conducted four months after the time in question. In *Com. v. Twitchell*, 1 Brewst. 551, the object of the experiment was to ascertain the facility of breaking a human skull with a poker. A witness testified that he made experiments upon another skull with a poker, like the one with which it was claimed that the skull in question was broken. Held, that he could not testify as to the result of his experiments.

² *Ante*, § 56. *State v. Justus*, 11 Ore. 178, 8 Pac. Rep. 337, 50 Am. Rep. 470, was a case where the defendant had shot his father. The defendant claimed that the shooting was accidental, and that when it occurred he stood at a distance of about twelve feet from his father. The judgment of conviction was reversed, because of evidence of a series of experiments in shooting at targets at the same and shorter distances, which evidence was offered for the purpose of showing that defendant stood much nearer his father when he shot. The court, after calling attention to the fact that gunshot wounds belong to a branch of medical science, and to the fact that the circumstances might vary the result, depending upon the load, wadding and the difference in the nature of the texture between the human body and the substance upon which the experiments were made, said: "It would seem, then, hardly to be safe to permit non-professional witnesses to prove, through the instrumentality of

mention should be made of the interesting case of *People v. Sevine*.¹ In that case the defendant was on trial for arson, and, it becoming material to ascertain how long it would take

experiments, matters not within the range of their observation and experience, and of which they are supposed to be incompetent to deal." In *Libby v. Scherman*, 146 Ill. 540, 34 N. E. Rep. 801, 37 Am. St. Rep. 191, where the plaintiff sued for an injury to his person, caused by the falling of a part of a pile of barrels filled with pork, after the contents of one of the barrels had been removed, it was alleged that such act rendered the barrels above less secure. The defendant sought to show an experiment by which a barrel, located relatively the same as the empty barrel, had been entirely taken out without the barrels above it falling. This evidence the trial court excluded, and in reviewing such ruling the supreme court said: "We are clearly of the opinion that experiments of that character and their results, and inferences drawn from them by witnesses, were mere collateral matters, which could have no legitimate bearing upon the issues before the jury. Besides, the impossibility of showing that the conditions under which these experiments were made were in all respects identical with those existing at the time the plaintiff was injured, and the multitude of collateral issues which an attempt to prove identity of conditions would raise, the fact that one experiment had been conducted to a successful issue would have little, if any, tendency to show that in another case precisely like it an accident might not happen. A thousand men may pass an impending wall with safety, or at least without injury, but the next man who attempts to pass it may be crushed by its fall. The question is not whether

a pile of barrels might not stand situated as was the one in this case, but whether leaving such barrel in the condition shown rendered the support of the barrels above it less secure, and that to such a degree as to constitute negligence, and whether the plaintiff's injury occurred as the result of such negligence. So far as these witnesses were sought to be examined as experts, it does not appear that they had any special knowledge or skill on the subject, unless it was that gained by means of the experiments which counsel attempted, but was not permitted to prove. Nothing therefore is proved which tends to show that they were any better qualified to express an opinion on the subject than were any of the jurors before whom the cause was being tried; and, even admitting that the subject was one for expert testimony—a proposition which may well be doubted—their answers to questions put to them, calling for their opinions, would obviously have been merely a means of getting before the jury by indirection the results of the experiments, if not the experiments themselves." In *Sullivan v. Com.*, 93 Pa. St. 285, where the deceased was shot in the abdomen, through her night-gown, it was held competent, in order to show the effect of gunpowder at close range, for a physician to testify to experiments made by him with the same pistol, loaded with cartridges out of the same box, in shooting at a material similar to the material of which the night-gown was composed.

¹ *People v. Levine*, 85 Cal. 39, 22 Pac. Rep. 969.

for a candle to burn down to a certain point, it was held proper to show such fact by an experiment conducted in the presence of the jury.

§ 67. **Other occurrences in fire cases.**—While it is settled in most of the states, where the subject is not regulated by statute, that the mere fact that a locomotive sets out a fire upon the land of an adjoining owner does not cast upon the company any *onus* of proof, yet there may be room for an inference of negligence, if the evidence shows that the same locomotive, at or about the time in question, set other fires adjacent to the right of way. It is therefore competent to show such fact as a circumstance having a tendency to establish negligence.¹ As stated by the New York Court of Appeals:² “The more frequent these occurrences and the longer time they would have been apparent, the greater the negligence of the defendant; and such proof would disarm the defendant of the excuse that, on the particular occasion, the dropping of the fire was an unavoidable accident.” In cases where a fire is traced to a railroad company, and the evidence does not identify the engine which set the fire, the weight of authority justifies the statement that evidence may be introduced that at about that time the company’s locomotives generally, or many of them, threw sparks of unusual size, or kindled numerous fires upon adjoining property. The grounds for this doctrine are aptly stated by Denio, C. J., in an earlier New York case.³ Evidence was there introduced that the locomotives of the defendant generally lacked a certain equipment, ordinarily used, rendering locomotives less likely to set fires. It was objected that this evidence was too remote. In passing on its competency the learned chief justice said: “This argument is not without force, but at the same time I think it is

¹ *O. & M. Railroad Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. Rep. 812; *Louisville, etc., R. Co. v. McCorkle*, 12 Ind. App. 691, 40 N. E. Rep. 26; *Louisville, etc., R. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. Rep. 609. *Contra*, *Bell v. Chicago, etc., R. Co.*, 64 Iowa 321, 20 N. W. Rep. 456.

² *Field v. New York, etc., R. Co.*, 32 N. Y. 339.

³ *Sheldon v. Railroad*, 14 N. Y. 218, 67 Am. Dec. 155.

met by the peculiar circumstances of this case. These engines run night and day, and with such speed that no particular note can be taken of them as they pass. Moreover, there is such a general resemblance among them that a stranger to the business can not readily distinguish one from another. * * * It would be practically quite impossible by any inquiries to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad supposes a unity of management, and a general similarity in the fashion of the engines and the character of operation. I think, therefore, it is competent *prima facie* evidence, for a person seeking to establish the responsibility of the company, for a burning upon the track of the road, after refuting every other probable cause of the fire, to show that, about the time when it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces as to be likely to set on fire objects not more remote than the property burned. It is presumed to be in the power of the company, which is intimately acquainted with all its engineers and conductors, to controvert the fact sworn to if it is untrue, or, if true in a particular instance, to show that it was not so in respect to the engines which passed the place at a particular time before the fire. The effect of the evidence could only be to shift the *onus probandi* upon the company, and that, under the circumstances of this case, seems to me just and equitable." This case finds very general support in the authorities.¹ But as the

¹ Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Pennsylvania Co. v. Stranahan, 79 Pa. St. 405; Henderson v. Philadelphia, etc., R. Co., 144 Pa. St. 461, 22 Atl. Rep. 851, 27 Am. St. Rep. 652; Thatcher v. Maine Central R. Co., 85 Me. 502, 27 Atl. Rep. 519; St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47; Longabaugh v. Virginia, etc., Co., 9 Nev. 271; Diamond v. Northern Pacific, etc., R. Co., 6 Mont. 580, 13 Pac. Rep. 367; Cleaveland v. Railroad Co., 42 Vt. 449; Smith v. Railroad Co., 10 R. I. 22; Norfolk R. Co. v. Bohannon, 85 Va. 293, 7 S. E. Rep. 236; Annapolis, etc., R. Co. v. Gantt, 39 Md. 115; Steele v. Pacific Coast, etc., R. Co., 74 Cal. 323, 15 Pac. Rep. 851; Evansville, etc., R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. Rep. 296; Gibbons v. Wisconsin Valley, etc., R. Co., 58 Wis. 335, 17 N. W. Rep. 132; Koontz v. Oregon, etc., and Nav. Co., 20 Ore. 3, 23 Pac. Rep. 820.

habits of a railroad company—if this expression may be permitted—may change with the management, the evidence should ordinarily be confined to about the time of the setting of the fire.¹ In the case of *Grand Trunk R. Co. v. Richardson*,² it was intimated that evidence as to the condition of other locomotives might be shown, although the particular locomotive which set the fire was identified. The authorities which have heretofore been cited on this general question state the doctrine more guardedly, and in some of them it has been expressly held that it was error to admit the evidence if the locomotive was identified.³ With all due deference, it must be said that the doctrine of *Grand Trunk R. Co. v. Richardson*, *supra*,⁴ in the respect last mentioned, is utterly wrong, for, since the evidence of the plaintiff points to a particular locomotive as the cause of injury, the introduction of evidence that other locomotives were defective would amount to evidence that the defendant company was generally careless as proof of the specific allegation that in the particular instance it was negligent. Such a doctrine falls afoul of a leading doctrine concerning collateral evidence,⁵ and there would be quite as much warrant for convicting persons in criminal cases by proof of their general criminal tendencies. If the evidence does not identify the locomotive, then the proof that the fire proceeded from the railroad is greatly strengthened by evidence that the defendant was using locomotives which were likely to set the fire. Such evidence would array itself directly in the line of causation. In a Wisconsin case,⁶ the case of *Grand Trunk R. Co. v. Richardson* is thus criticised: “In

¹ *Henderson v. Philadelphia, etc., R. Co.*, 144 Pa. St. 461, 22 Atl. Rep. 851, 27 Am. St. Rep. 652; *Thatcher v. Maine Central, etc., R. Co.*, 85 Me. 502, 27 Atl. R. 519.

² *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

³ *Gibbons v. Wisconsin Valley, etc., R. Co.*, 58 Wis. 335, 17 N. W. Rep. 132; *Ireland v. Cincinnati, etc., R. Co.*, 79 Mich. 163, 44 N. W. Rep. 426; *Sherman and Redfield on Negligence*,

§ 675. It was held in *Evansville, etc., Co. v. Keith*, 8 Ind. App. 57, 35 N. E. Rep. 296, that the identification of the train by number, to which the locomotive was attached, was not a necessary identification of the latter.

⁴ *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

⁵ *Ante*, § 52.

⁶ *Gibbons v. Wisconsin, etc., R. Co.*, 58 Wis. 355, 17 N. W. Rep. 132.

due deference to the learned judge who wrote the opinion, and the other judges who have used this language, it is submitted that a possibility can never establish a probability of a fact required to be proved in order to make a railroad company or any party liable in any action whatever, and the proposition is no sounder in logic than in law. It would be monstrous doctrine that where a party is sued in tort for a personal injury to another, occasioned by his negligence in not furnishing proper appliances, or otherwise, his common carelessness in other cases would tend to prove the 'possibility,' and therefore 'probability,' that the act charged was the result of his negligence, without proof even that he committed it. In cases where it is shown, either by positive or circumstantial evidence, that some locomotive of the company caused the fire, without the identification of any particular one, such evidence might have weight in showing the neglect of the company."

§ 68. Prior habit of person as proof of what was done at a particular time.—Where the question is as to how a person conducted himself at a particular time, it is not competent to show that prior thereto he was generally careless or the reverse.¹ Proof of prior particular disconnected acts is even

¹Tenney v. Tuttle, 1 Allen 185; Gahagan v. Boston, etc., R. Co., 1 Allen 187, 79 Am. Dec. 724; Heland v. Lowell, 3 Allen 407, 81 Am. Dec. 670; McDonald v. Savoy, 110 Mass. 49; Baltimore Elevator Co. v. Neal, 65 Md. 438, 5 Atl. Rep. 338; Eaton v. N. E. Telegraph Co., 68 Me. 63; Chase v. Maine, etc., R. Co., 77 Me. 62, 52 Am. Rep. 744; Morris v. East Haven, 41 Conn. 252; Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445; Glass v. Memphis, etc., R. Co., 94 Ala. 581, 10 So. Rep. 215; Jacobs v. Duke, 1 E. D. Smith 271; Link v. Jarvis, (Cal.) 33 Pac. Rep. 206; Pueblo Bldg. Co. v. Klein, 5 Colo. App. 348, 38 Pac. Rep. 608; Southern, etc., R. Co. v. Robbins, 48 Kan. 145, 23 Pac. Rep. 113; Langworthy v. Township of Green, 88 Mich. 207, 50 N. W. Rep. 130. In Mertz v. Detweiler, 8 W. & S. (Pa.) 376, a suit for malpractice, evidence of the general skill of the defendant as a surgeon was rejected. The court said: "It was not that, but his treatment of the particular case, with which the jury had to do. If the latter was notoriously bad, of what account would be his abstract science or treatment of other cases? It may be said that his general qualifications might serve to shed light on the propriety of his practice in this particular instance, but it is light which would be less likely to lead to a sound consideration than to lead astray." To the same effect, Hays v. Millar, 77 Pa. St. 238,

more plainly within the line of exclusion.¹ The weight of authority favors the view, however, that where the direct evidence shows that an act was done or omitted, it is competent to prove that a custom existed prior to that time to do or not do such act, as such evidence legitimately tends to uphold the theory of one of the contending parties.²

18 Am. Rep. 445; *Rollins v. Griffin*, 7 Misc. R. 232, 27 N. Y. S. 269; *Chase v. Maine, etc., R. Co.*, *supra*; *Link v. Jarvis*, *supra*; *Langworthy v. Township of Green*, 88 Mich. 207, 50 N. W. Rep. 130. In *Leighton v. Sargeant*, 11 Fost. 460, 59 Am. Dec. 388, such evidence was held admissible, where the declaration alleged a want of skill. There are a few cases, however, which authorize evidence as to the prudent habits of a deceased person, on an issue as to his contributory negligence, where there were no eye-witnesses to the accident and where better evidence can not be obtained. *Southern, etc., R. Co. v. Robbins*, 43 Kan. 145, 23 Pac. Rep. 113, and cases cited. See *Guggenheim v. Lake Shore, etc., R. Co.*, 66 Mich. 150, 33 N. W. Rep. 161.

¹ *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 5 Atl. Rep. 338; *Robinson v. Fitchburg, etc., R. Co.*, 7 Gray 92; *Wentworth v. Smith*, 44 N. H. 419, 82 Am. Dec. 228; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569; *Southern, etc., R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Edwards v. Ottawa Riv. Nav. Co.*, 39 Up. Can. Q. B. 264.

² Where the question was as to whether a railway employe had placed a stool at the foot of the steps of a car, it was held that if a witness had testified to the location of the stool at such point, it would have been proper to have

corroborated him by proof of the invariable custom of the servant, but that it was not proper in the absence of such testimony to admit in defense evidence of custom. *Atlanta, etc., R. Co. v. Holcombe*, 76 Ga. 590, 13 S. E. Rep. 751. In *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 Pac. Rep. 848, the court said: "If it had been proposed to show that the gripman had been in the service of the company for a considerable time, and that it had been his particular habit not to stop in the middle of the block, this would have lent corroboration to his testimony that he did not stop; for in case of doubt as to what a person has done, it may be considered more probable that he has done what he has been in the habit of doing than that he acted otherwise." It has been held in several cases, where the question in dispute was as to whether a railway company operated a train at a certain high rate of speed at a particular point, on a certain occasion, that it was competent to corroborate the affirmative evidence on that point by proof of a custom existing at that time for the company to so run that train. *Sheldon v. Railroad Co.*, 14 N. Y. 218, 67 Am. Dec. 155; *Chicago, etc., R. Co. v. Spilker*, 134 Ind. 562, 33 N. E. Rep. 280; *Shaber v. Railway Co.*, 28 Minn. 103, 9 N. W. Rep. 575; *Henry v. Railroad Co.*, 50 Cal. 176; *Presby v. Grand, etc., R. Co.*, 66 N. H. 615, 22 Atl. Rep. 554. *Contra*, *Meloy v. Chicago, etc., R. Co.*, 77 Iowa 743, 42 N. W. Rep. 563, 14 Am. St.

§ 69. **Subject of custom or usage as affecting negligence.**—This subject is considered elsewhere.¹

§ 70. **Prior specific acts to prove notice of negligent character.**—"We think it is well settled," says the Indiana Supreme Court,² "not only by the authorities, but in reason and on principle, that for the purpose of showing that the officers of a railroad company had not exercised due care, prudence, and caution in the employment, or in retaining in service, of careful, prudent and skillful persons to manage and operate such road, and for the purpose of charging such corporation with notice of the incompetency of its employes, it may be shown that such employes had been guilty of specific acts of carelessness, unskillfulness and incompetency, and that such acts were known to such officers prior to the employment of such agents, or that such employes had been retained in such service after notice of such acts."³

Rep. 325; *Baltimore, etc., R. Co. v. Woodruff*, 4 Md. 242; *Chicago, etc., R. Co. v. Lee*, 60 Ill. 501. In *Savannah, etc., R. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. Rep. 471, 14 Am. St. Rep. 183, the court refused to reverse the cause on account of the admission of such evidence upon the trial, but the court intimated a doubt as to the competency of the evidence. In *Schoneman v. Fegely*, 14 Pa. St. 376, where a witness could not recollect whether he had given a receipt, it was held competent to prove his custom to give a receipt in such cases. So, in *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256, 94 Am. Dec. 65, it was held proper to corroborate the defective memory of a witness by proof of what was his habit under similar circumstances. In *Brouillette v. Connecticut, etc., R. Co.*, 162 Mass. 98, 38 N. E. Rep. 507, on an issue as to contributory negligence, it was held that evidence of previous statements by plaintiff, as to his ability to keep

out of the way of trains and not get hurt, was competent, as bearing upon the question as to his readiness to take risks. In a case where a question arose as to whether the plaintiff was drunk at the time of an accident, and there was evidence to that effect, it was held proper to ask plaintiff whether he was not at that time an habitual drunkard. *McCracken v. Village of Markensan*, 76 Wis. 499, 45 N. W. Rep. 323. But where there was no evidence of intoxication at the time, such evidence was held properly rejected. *Cleghorn v. The New York Cent., etc., R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Langworthy v. Township of Green*, 88 Mich. 207, 50 N. W. Rep. 130.

¹ *Post*, Chap. IV.

² *Pittsburg, etc., R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111.

³ The court in the above case cites the following authorities in support of its views: *Gahagan v. Boston, etc., R.*

§ 71. **Condition of object or place before and after.**—It often happens that it becomes material to inquire into the condition or character of an object or place at a certain time, but that there is no person who saw the object or place at that precise time. The authorities justify the proposition that its condition before and after the time in question may be shown, as evidence of its condition at the time under inquiry, provided, that the time before or after is sufficiently near to the time in question as to justify an inference that the condition was the same.¹ Hoops of steel can not be put around a rule of this kind. Within limits, it is a question for the sound discretion of the trial court. The application of the rule depends largely upon whether the condition is transitory or more or less permanent. Thus, while evidence as to the condition of a defective sidewalk a few days after an accident might be competent,² such limits would be entirely too broad where the question was as to the condition of a sidewalk alleged to have been unsafe because of ice.³ On the other hand, the time limit would expand very broadly if the question was as to the condition of a large log, firmly imbedded in the earth of a highway.⁴ Where a railroad company was charged with negligently using a locomotive that was out of repair, and thereby setting fire to plaintiff's property, it was held incompetent for the plaintiff to prove that the locomotive was out of repair several

Co., 1 Allen 187, 79 Am. Dec. 724; Illinois, etc., R. Co. v. Reedy, 17 Ill. 580; Galena, etc., R. Co. v. Yarwood, 17 Ill. 509, 65 Am. Dec. 682; Quimby v. Vermont, etc., R. Co., 23 Vt. 387; Louisville, etc., R. Co. v. Collins, 2 Duvall 114, 87 Am. Dec. 486. *Contra*, Frazier v. Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 467.

¹ Swadley v. Mo. Pac. R. Co., 118 Mo. 268, 24 S.W. Rep. 140, 40 Am. St. Rep. 366; McCulloch v. Dobson, 133 N. Y. 114, 30 N. E. Rep. 641. See Stoker v. St. Louis, etc., R. Co., 91 Mo. 509, 4 S. W. Rep. 389. In a rape case the evidence of a physician as to the condition of the woman ten days after was held

competent. Myers v. State, 84 Ala. 11, 4 So. Rep. 291. In Com. v. Wood, 11 Gray 85, and in Com. v. Follansbee, 155 Mass. 274, 29 N. E. Rep. 471, like rulings were made, where the evidence was directed to the condition of the woman about a month after the alleged abortion.

² City of Chicago v. Dalle, 115 Ill. 386, 5 N. E. Rep. 578.

³ Berrenberg v. City of Boston, 137 Mass. 231, 50 Am. Rep. 296.

⁴ Langworthy v. Township of Green, 88 Mich. 207, 50 N. W. Rep. 130; Berrenberg v. City of Boston, 137 Mass. 231, 50 Am. Rep. 296.

months subsequently.¹ If there is other affirmative evidence that the condition of the place or object was the same at the time that another witness saw it as it was at the time specially in question, such testimony, even if the two occasions are somewhat remote, would render the testimony as to the prior or subsequent condition, with which the latter witness was acquainted, competent. In other words where inference fails, affirmative testimony may still uphold.² So, in a case where the question was as to the dimensions and slope of an ice formation at a particular time, it was held competent to show its condition shortly after, there being evidence of such weather conditions as rendered it probable that the ice formation had not varied in the meantime.³

§ 72. **Subsequent precautions.**—The act of a defendant subsequent to an accident in making repairs, erecting guards or exercising greater care can not be construed as an admission that he was previously negligent.⁴ The courts of the states of

¹ *Collins v. New York Central, etc.,* etc., R. v. Clem, 123 Ind. 15, 23 N. E. R. Co., 109 N. Y. 243, 16 N. E. Rep. 50. Rep. 965, 18 Am. St. Rep. 303; Board

² *Langworthy v. Township of Green,* Comm'r's Wabash Co. v. Pearson, 129 88 Mich. 207, 50 N. W. Rep. 130; Ind. 456, 28 N. E. Rep. 1120; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. Rep. 423; *Fox v. Peninsular W. L. & C. Works*, 84 Mich. 676, 48 N. W. Rep. 203; *Thompson v. Toledo, etc., R. Co.*, 91 Mich. 255, 51 N. W. Rep. 995;

³ *Berrenberg v. City of Boston*, 137 Mass. 231, 50 Am. Rep. 296. *Cramer v. Burlington*, 45 Iowa 627;

⁴ *Dougan v. Transportation Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Corcoran v. Village of Peeksville*, 108 N. Y. 151, 15 N. E. Rep. 309; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47, and cases cited; *Shinners v. Proprietors*, 154 Mass. 168, 28 N. E. Rep. 10, 26 Am. St. Rep. 226; *Atchison, etc., R. Co. v. Parker*, 55 Fed. Rep. 595; *Columbia etc., R., Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. Rep. 591; *Savannah, etc., R. Co. v. Flannagan*, 82 Ga. 579, 9 S. E. Rep. 471, 14 Am. St. Rep. 183; *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 23 N. E. Rep. 965, 18 Am. St. Rep. 303; *Board Comm'r's Wabash Co. v. Pearson*, 129 Ind. 456, 28 N. E. Rep. 1120; *Hodges v. Percival*, 132 Ill. 53, 23 N. E. Rep. 423; *Fox v. Peninsular W. L. & C. Works*, 84 Mich. 676, 48 N. W. Rep. 203; *Thompson v. Toledo, etc., R. Co.*, 91 Mich. 255, 51 N. W. Rep. 995; *Cramer v. Burlington*, 45 Iowa 627; *Hudson v. Chicago, etc., R. Co.*, 59 Iowa 581, 13 N. W. Rep. 735, 44 Am. Rep. 692; *Lang v. Sanger*, 76 Wis. 71, 44 N. W. Rep. 1095; *Anderson v. Chicago, etc., R. Co.*, 87 Wis. 195, 58 N. W. Rep. 79; *Alcorn v. Chicago, etc., R. Co.*, 108 Mo. 81, 14 S. W. Rep. 943; *Mahaney v. St. Louis, etc., R. Co.*, 108 Mo. 191, 18 S. W. Rep. 895; *Colorado Electric Co. v. Lubbers*, 11 Colo. 505, 19 Pac. Rep. 479, 7 Am. St. Rep. 255; *St. Louis, etc., R. Co. v. Jones (Tex.)*, 14 S. W. Rep. 309; *Gulf, etc., R. Co. v. Compton*, 75 Tex. 667; *Hale v.*

Pennsylvania and Kansas are alone in holding to the contrary.¹ The Minnesota Supreme Court followed the Pennsylvania Supreme Court on this point in one case,² but subsequently that court overruled its earlier decision,³ after a full consideration of the question. "True policy and sound reason," says Elliott, J.,⁴ "require that men should be encouraged to improve or repair, and not be deterred from it by the fear that, if they do so, their acts will be construed into an admission that they have been wrong-doers. A rule which so operates as to deter men from profiting by experience, and availing themselves of new information, has nothing to commend it, for it is neither expedient nor just. * * * The fact that the happening of an accident may convey information producing a conviction or belief that had extraordinary precaution been taken the injury would have been prevented, does not legitimately tend to prove that ordinary care and vigilance were not exercised. All may be done that ordinary care required, and yet a person, satisfied by experience that a higher degree of care may insure absolute safety, may employ extraordinary means to prevent accidents in the future. In doing this he does what is commendable, and certainly he ought not to be restrained or checked by the fear that if he does resort to unusual means to insure safety, he may be treated as one who confesses that he was a wrong-doer when the accident occurred. It is unjustly burdening one who, influenced by the light supplied by events, resorts to greater precautions to insure the safety of others." In an English case,⁵ Branwell, J., expressed himself thus: "People do not

South. Pac. Co., (Cal.) 33 Pac. Rep. 119; *Holt v. Spokane, etc., Co.*, (Ida.) 35 Pac. Rep. 39. See *Columbia, etc., R. Co. v. Hawthorne*, 3 Wash. Ter. 353, 19 Pac. Rep. 25.

¹ *Westchester, etc., R. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218; *Pennsylvania Tel. Co. v. Varnau*, (Pa. St.) 15 Atl. Rep. 624; *St. Louis, etc., R. Co. v.*

South. Pac. Co., (Cal.) 33 Pac. Rep. 119; *Holt v. Spokane, etc., Co.*, (Ida.) 35 Pac. Rep. 39. See *Columbia, etc., R. Co. v. Hawthorne*, 3 Wash. Ter. 353, 19 Pac. Rep. 25.

Weaver, 35 Kan. 412, 57 Am. Rep. 176.

² *O'Leary v. Mankato*, 21 Minn. 65. ³ *Morse, Admx., v. Minneapolis, etc., R. Co.*, 16 N. W. Rep. 358.

⁴ *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 23 N. E. Rep. 965, 18 Am. St. Rep. 303.

⁵ *Hart v. Railway Co.*, 21 Law T. (N. S.) 261.

furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." It is to be recollected, however, that evidence of subsequent repairs is excluded in the many cases cited in the first note to this section solely on the ground that the fact of subsequent repairs is not evidence of prior negligence. There is no reason why proof should not be made of such repairs, if the fact of the making of them be relevant, under the circumstances of the particular case. Such evidence has been held competent as proof of acts of domination, amounting to admissions of proprietorship, or obligation to repair.¹ In two cases such evidence was held competent to explain photographs of the *locus in quo*, taken subsequent to the accident.² In a Texas case, where a train had been derailed, by reason of sand washing on to the track, at a point where it crossed a street, at the foot of a steep incline, it was held that subsequent alterations might be shown, to prove that it was practicable to prevent the washing of the sand upon the crossing.³ In another derailment case from the same state, the defendant's witnesses having testified to the good condition of the track at the particular point, and that the track was used after the wreck without being repaired, it was held that it was competent for the plaintiff to prove by a witness that he saw the track a short time after the derailment and that new ties had been put in at that point.⁴

§ 73. **Other writings.**—Where several writings are executed between the same parties substantially at the same time, and

¹ *Readman v. Conway*, 126 Mass. 374; *City of La Fayette v. Weaver*, 92 Ind. 477; *Manderschid v. Dubuque*, 29 Iowa 73, 4 Am. Rep. 196; *Skottowe v. Oregon, etc., R. Co.*, 22 Ore. 430, 30 Pac. Rep. 222.

² *St. Louis, etc., R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. Rep. 104.

³ *St. Louis, etc., R. Co. v. Johnston*, 78 Tex. 536, 15 S. W. Rep. 104.

⁴ *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766, 22 S. W. Rep. 235, and see *Chicago, etc., R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960.

relating to the same subject-matter, such writings may be read together as forming parts of one transaction, although the instruments do not in terms refer to each other.¹

§ 74. **Evidence where title in question.**—Sir James Stephen states, in article 5 of his Digest of the Law of Evidence, that “when the existence of any right of property, or of any right over property, is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence, or renders its existence improbable, is deemed to be relevant.”

§ 75. **Special circumstances of plaintiff or his family.**—In an Iowa case,² it was held by a divided court, that where the plaintiff, a physician, was suing for a disabling injury to his person, it was proper for him to prove that he was poor and wholly dependent upon his profession for support. The theory of the ruling was that as the fact that the plaintiff was dependent on his earnings for support was proper, it was competent to show that he was poor as a circumstance tending to show his dependence.³ There are cases which go further, and give support to the view that in personal injury cases it is proper for the plaintiff to show the fact of his poverty. Thus, in a suit against a municipality, by a parent, for an injury to the person of her daughter, it was held proper, by the Supreme Court of Illinois, to show the fact of plaintiff's poverty. “If poor and dependent,” the court said, “she had suffered a greater loss than if rich and independent.”⁴ The idea

¹ *Bailey v. Hannibal, etc., R. Co.*, 84 U. S. 96; *Cornell v. Todd*, 2 Denio 130; *Jackson v. Dunsbagh*, 1 Johns. Cas. 91; *Stow v. Tift*, 15 John. 457, 3 Am. Dec. 266; *Railroad Co. v. Crocker*, 29 Vt. 540; *Jackson v. McKenny*, 3 Wend. 233, 20 Am. Dec. 690.

² *Stafford v. City of Oskaloosa*, 64 Iowa 251, 20 N. W. Rep. 174.

³ Where a brakeman was suing for the loss of an arm it was held competent to prove that he had no education. *Helton v. Alabama, etc., R. Co.*, 97 Ala. 275, 12 So. Rep. 276.

⁴ *City of Chicago v. Powers*, 42 Ill. 169, 89 Am. Dec. 418.

on which the above case proceeds finds still more explicit statement in an earlier Illinois case,¹ in which the action was for an assault and battery. It was there held that the plaintiff was entitled to show that he was a poor man with a large family. The court said: "In actions of this kind, the condition in life and the circumstances of the parties are peculiarly the proper subjects for the consideration of the jury in estimating the damages. Their pecuniary circumstances may be inquired into. It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessities of life." Another Illinois case upholds this view,² and there are cases authorizing proof of the plaintiff's poverty in Maryland³ and Missouri.⁴ Some countenance is given to these cases by expressions of the courts in New York⁵ and Massachusetts.⁶ In a New York case,⁷ which was an action of slander, it was held proper to prove that the plaintiff was a mother, for the reason that the jury had a right to consider, in aggravation of damages, that she had children who would be disgraced by the charge. So in *Cahill v. Murphy*,⁸ another slander case, where the defendant had charged the plaintiff with arson, in burning her property to defraud an insurance company, and the circumstances under which the charge was made rendered it probable that she would thereby be compelled to resort to litigation to recover the insurance, it was held that evidence that plaintiff had three children dependent upon her for support was competent, on the theory that she was entitled to recover for mental anguish.⁹ But the admission of evidence of the

¹ *McNamara v. King*, 7 Ill. 432.

⁶ *Reed v. Davis*, 4 Pick. 216.

² *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88.

⁷ *Enos v. Enos*, 135 N. Y. 609, 32 N. E. Rep. 123.

³ *Gaither v. Blowers*, 11 Md. 536.

⁸ *Cahill v. Murphy*, 94 Cal. 29, 30

⁴ *Beck v. Dowell*, 111 Mo. 506, 20 S. W. Rep. 209.

Pac. Rep. 195, 28 Am. St. Rep. 88.

⁵ *Bump v. Betts*, 23 Wend. 85.

⁹ See, also, to the same effect, *Rhodes v. Naglee*, 66 Cal. 677, 6 Pac. Rep. 863.

number of plaintiff's children, in an action for negligence resulting in an injury to plaintiff's person, has been held reversible error, as no recovery could be had for an injury to the comfort of the family.¹ So in Michigan, in an action which survived to a wife for the death of her husband, it was held improper to prove the number of living children by the marriage.² But in another Michigan case,³ Campbell, J., after indicating that in more remote relationships evidence should be more restricted, to avoid what would be merely problematical, says: "But where the head of a family is taken away, there is a distinct relation between the family circumstances and the family supporter. In such a case we think the fullest insight into the family circumstances is of value in determining to what extent they are injured by the loss of their head."⁴ In this class of actions evidence is competent as to the amount of property the deceased had acquired, as to his habits of industry, his ability to make money, his success in business, and other details of this character.⁵ In actions for injuries to children it has been held error to introduce evidence as to the plaintiff's inability to employ persons to attend them, as bearing on the issue of contributory negligence, since there can not be one law for the rich and another law for the poor.⁶

§ 76. **Pecuniary circumstances of defendant.**—In suits for breach of promise to marry, the relevancy of evidence as to the pecuniary condition of the defendant can not admit of

¹ *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Dayharsh v. Hannibal*, etc., R. Co., 103 Mo. 570, 15 S. W. Rep. 554, 23 Am. St. Rep. 900; *Missouri*, etc., R. Co. v. *Lydo*, 57 Tex. 505.

² *Larzolere v. Kirchgessner*, 73 Mich. 276, 41 N. W. Rep. 488.

³ *Staal v. Grand Rapids*, etc., R. Co., 57 Mich. 230, 23 N. W. Rep. 795.

⁴ Evidence of decedent's family expenses is competent. *Hudson v. Houser*, 123 Ind. 309, 24 N. E. Rep. 243. The habit of the deceased to turn his earnings over to his wife to

be used in the support of the family may be shown. *Lake Erie*, etc., R. Co. v. *Mugg*, 132 Ind. 168, 31 N. E. Rep. 564.

⁵ *Shaber v. St. Paul*, etc., R. Co., 30 Mich. 179, 9 N. W. Rep. 575. But the jury is not at liberty to speculate on the probability of the deceased obtaining an appointment to a political office. *Richmond*, etc., Co. v. *Allison*, 86 Ga. 145, 12 S. E. Rep. 352.

⁶ *Indianapolis*, etc., R. Co. v. *Pitzer*, 109 Ind. 179, 6 N. E. Rep. 310, 58 Am. Rep. 387.

doubt, as such evidence tends to prove what the plaintiff has lost.¹ The authorities upon the subject for the most part hold that this class of evidence is admissible in actions for defamation, upon the ground that wealth is usually attendant with corresponding influence.² The correctness of this doctrine has been doubted in some courts,³ and denied in others.⁴ The general disposition in this country is to admit evidence as to the wealth of the defendant in actions where he may be punished with vindictive damages.⁵ Lord Mansfield has been quoted as saying that it should be immaterial whether the damages came out of a deep pocket or not,⁶ and there is eminent authority in this country against the admissibility of evidence of the defendant's wealth to enhance vindictive damages.⁷ There has

¹ *Kelly v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Kniffen v. McConnell*, 30 N. Y. 285; *Watson v. Watson*, 53 Mich. 168, 18 N. W. Rep. 605, 51 Am. Rep. 111; *Bennett v. Beam*, 42 Mich. 346, 38 Am. Rep. 442; *Stratton v. Dole*, 45 Neb. 472, 63 N. W. Rep. 875.

² *Rea v. Harrington*, 58 Vt. 181, 2 Atl. Rep. 475, 56 Am. Rep. 561; *Humphries v. Parker*, 52 Me. 502; *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185; *Hayner v. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303; *Brown v. Barnes*, 39 Mich. 211, 33 Am. Rep. 375; *Hosley v. Brooks*, 20 Ill. 115, 71 Am. Dec. 252; *Karney v. Paisley*, 13 Iowa 89; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. Rep. 307, 5 Am. St. Rep. 413.

³ *Case v. Marks*, 20 Conn. 248; *Holmes v. Holmes*, 64 Ill. 294.

⁴ *Donnell v. Jones et al.*, 13 Ala. 490, 48 Am. Dec. 59; *Seay v. Glenwood*, 21 Ala. 494; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Morris v. Barker*, 4 Harr. 520; *Enos v. Enos*, 135 N. Y. 609, 32 N. E. Rep. 123.

⁵ *Webb v. Gilman*, 80 Me. 177, 13 Atl. Rep. 688; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6;

Watson v. Watson, 53 Mich. 168, 18 N. W. Rep. 605, 51 Am. Rep. 111; *White v. Gregory*, 126 Ind. 95, 25 N. E. Rep. 806, and cases cited; *Sexson v. Hoover*, 1 Ind. App. 65, 27 N. E. Rep. 105; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768, 9 N. W. Rep. 599, and cases cited; *Draper v. Baker*, 61 Wis. 450, 21 N. W. Rep. 527, 50 Am. Rep. 143.

⁶ See *Hodsoll v. Taylor*, L. R., 9 Q. B. 79.

⁷ In *Watson v. Watson*, 53 Mich. 168, 18 N. W. Rep. 605, 51 Am. Rep. 111, *Cooley, J.*, after referring to the case of *Toledo, etc., R. Co. v. Smith*, 57 Ill. 517, in which it was held that evidence of the wealth of one of the defendants must be rejected, in a case where there are joint defendants, because of the tendency of the evidence to increase the verdict against the co-defendant, says: "The plaintiff's injury is no greater and no less because two persons united in committing it, and the measure of his redress ought not to depend on a circumstance unimportant to the injury. When it is made to do so it is because the court, while nominally proceeding to give compensation, is really losing

been more of hesitancy in admitting this class of evidence in seduction cases, because of the technical character of the action, but even upon this point the strong tendency of the cases is in favor of admitting the evidence.¹ Within the principle of the doctrine of this section is the further doctrine that the defendant may show in evidence the fact of his poverty to keep down the allowance of vindictive damages.² This proposition does not admit of doubt, assuming the admissibility of evidence of wealth, in cases, at least, where the evidence of the defendant's poverty is in rebuttal of affirmative evidence as to his possession of means. Evidence of wealth, according to a Wisconsin case,³ should be confined to evidence of reputed wealth. This is, no doubt, the proper method of ascertaining the fact in a slander case, where the proof is offered to augment the compensatory damages,⁴ but no good reason suggests itself for this as an exclusive method of proof of wealth, aside from the considera-

sight of compensation in the endeavor to measure the desert of punishment. It is not redressing the plaintiff's injury, but it is punishing the defendant's misconduct, and it is doing this with the aid of a jury who in respect to it are held under none of the restraints which govern judicial action when punishment is the avowed object of the proceeding. The anomaly, that a jury may have liberty to punish at discretion for a tort, when, if the act were a crime, the penalty would be carefully limited by law, and that they may award the penalty they agree upon to a private suitor, or to swell his actual damages, has never received much countenance in this state." The most serious objection to Judge Cooley's argument is that it proves too much, for he really adduces an argument against the allowance of vindictive damages. It is to be observed that the above case was a seduction case. See *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. Rep. 628.

¹ *Clem v. Holmes*, 33 Gratt. 722, 36

Am. Rep. 793; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88; *White v. Murtland*, 71 Ill. 250, 22 Am. Rep. 100; *Applegate v. Ruble*, 2 A. K. Marsh. 128; *McAuley v. Birkhead*, 13 Ired. Law 28, 54 Am. Dec. 427; *Lavery v. Crooke*, 52 Wis. 612, 38 Am. Rep. 768, 9 N. W. Rep. 599; *Wilson v. Shepler*, 86 Ind. 275.

² *Johnson v. Smith*, 64 Me. 553; *Rea v. Harrington*, 58 Vt. 181, 56 Am. Rep. 561, 2 Atl. Rep. 475; *Draper v. Baker*, 61 Wis. 450, 21 N. W. Rep. 527, 50 Am. Rep. 143. But see *Case v. Marks*, 20 Conn. 248. In *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185, evidence of defendant's poverty was held proper, to show that he was a man of but little influence. But see *Case v. Marks*, *supra*; *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Morris v. Baker*, 4 Harr. 520.

³ *Draper v. Baker*, 61 Wis. 450, 21 N. W. Rep. 527, 50 Am. Rep. 143.

⁴ See *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. Rep. 628.

tion of time, where the evidence is offered to increase the vindictive damages.¹

§ 77. **Jury entitled to entire facts of case.**—As will be seen by a reference to the chapter on *res gestæ*, the authorities go far in authorizing all the facts to go in evidence which are really a part of the transaction under inquiry. One or two authorities must suffice to illustrate this proposition. Thus, in an Indiana case,² where a brakeman was suing for an injury received by himself in a collision, it was held that he might show that at the cost of great suffering he went a quarter of a mile to flag an approaching passenger train. In ruling upon the competency of this testimony, the court said: "It was admissible, not because the act of flagging the train, however meritorious that was, could be considered by the jury in fixing the amount of compensation, but because the plaintiff was entitled to recover not only for the permanent injury sustained, but for the physical pain and mental suffering occasioned by the injury. He was entitled to communicate to the jury the character and extent of his injury, and the nature and intensity of the suffering resulting therefrom. If the plaintiff had voluntarily walked a quarter of a mile, or any other distance, immediately after receiving the injury, and, after enduring great suffering, had been taken up by a passing train, and had thereupon become unconscious from pain, exhaustion and loss of blood, resulting from the injury, it can not be doubted that the facts might have been stated. The facts following immediately in connection with the injury are none the less admissible, because the plaintiff was impelled to exert himself by a high sense of duty to those on the approaching train. As brakeman upon the wrecked train, it was the plaintiff's duty, as it appeared to him under the circumstances, to flag the oncoming passenger train, and prevent the destruction of human life, which might have followed had no warning been

¹See *Webb v. Gilman*, 80 Me. 177, 13 Atl. Rep. 688; *Barkly v. Cope-* land, 74 Cal. 1, 15 Pac. Rep. 307, 5 Am. St. Rep. 413.
²*Evansville, etc., R. Co. v. Guyton*, 115 Ind. 450, 17 N. E. Rep. 101, 7 Am. St. Rep. 458.

given. This was the highest conception of the duty of a brakeman." A case quite dissimilar as to its facts from the one just cited, but still illustrative of the principle involved, is one¹ in which it was laid down, in a suit by a father for seduction, that evidence that it was accomplished under promise of marriage was admissible. The court, in ruling upon this question, presents its views thus: "If the defendant, in order to accomplish his outrage upon the rights of the father, has assumed liabilities to the daughter, this is no reason for excluding the evidence in an action by the father. So far as the promise of marriage tends to show the nature of the injury to the parent, or the means by which it was accomplished, the evidence is as pertinent as any other circumstance."

§ 78. Collateral facts illustrative of principal fact.—It is competent to make use in evidence of collateral facts, where they are directly illustrative of the principal fact. Upon this ground it was held in a personal injury case, as tending to show the vigorous health of plaintiff before she was injured, that she might show that before her injury she did the housework for a family of eight.²

§ 79. Same subject—Evidence relative to values.—In an Indiana case,³ where the plaintiff was suing for an injury to a meadow injured by fire, the court, although it recognized the law that the measure of damages was the difference between the value of the meadow just before, and its value just after, the burning, held that evidence was properly admitted as to

¹ *Phelin v. Kenderdine*, 20 Pa. St. 354.

² As a circumstance tending to lend greater probability to the claim of seduction there ought not to be a shadow of question concerning the admissibility of the evidence mentioned in the above case. (See *ante*, §§ 51, 57.) The Pennsylvania case has the support of other cases, (see note to Gil-

let *v. Mead*, 7 Wend. 193, as reported in 22 Am. Dec. 578), but there are New York cases to the contrary. *Gillet v. Mead*, *supra*; *Whitney v. Elmer*, 60 Barb. 250.

³ *City of Joliet v. Conway*, 119 Ill. 489, 10 N. E. Rep. 223.

⁴ *Pittsburg, etc., Co. v. Hixon*, 110 Ind. 225, 11 N. E. Rep. 285.

the cost of re-seeding, as such evidence furnished a side-light which would enable the jury to more intelligently weigh the testimony relating to the extent of the diminution in value. It has been held in New York that *bona fide* offers afford some evidence of value,¹ but the courts of a number of the states have denied this proposition.² There are, however, rulings and intimations, that where a witness is testifying, on behalf of the party seeking to recover, as to his own opinion of the value of property, it is competent for the party introducing him to prove by the witness that he has offered the sum for the property that he testifies it is worth, as evidence of this nature tends to prove the sincerity of the opinion of the witness.³ There is a distressing conflict upon the authorities as to the right of a party producing a witness as to value to prove by such witness the prices received in recent sales of like property in the same neighborhood. The courts of Massachusetts, New Hampshire, Illinois, Wisconsin, Iowa, Kansas and Washington may be cited as supporting the affirmative of this proposition,⁴ while the negative is maintained by the courts of New

¹ *Harrison v. Glover*, 72 N. Y. 451.

² *Fowler v. Commissioners*, 6 Allen 92; *Finley v. Quirk*, 9 Minn. 194, 86 Am. Dec. 93; *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. Rep. 55; *City of Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. Rep. 224, overruling *Muller v. Southern Pac. R. Co.*, 83 Cal. 240, 23 Pac. Rep. 265. In a suit to recover the value of a mule killed by the defendant, where the plaintiff had testified as to such value, it was held that on cross-examination the defendant was entitled to ascertain from the plaintiff the price which he paid for the mule four months before. *Jacksonville, etc., R. Co. v. Jones*, 34 Fla. 286, 15 So. Rep. 924.

³ *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. Rep. 55; *Perkins v. People*, 27 Mich. 386; *Dickenson v. Fitchburg*, 13 Gray 546.

⁴ *Paine v. City of Boston*, 4 Allen

168; *Shattuck v. Railroad*, 6 Allen 115; *Patch v. City of Boston*, 146 Mass. 52, 14 N. E. Rep. 770; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. Rep. 668; *Hunt v. City of Boston*, 152 Mass. 168, 25 N. E. Rep. 82; *March v. Railroad Co.*, 19 N. H. 372; *Culberston v. City of Chicago*, 111 Ill. 651; *Peoria, etc., Co. v. Terminal R. Co.*, 146 Ill. 372, 34 N. E. Rep. 550; *Watson v. Railroad Co.*, 57 Wis. 332, 15 N. W. Rep. 468; *Washburn v. Railroad Co.*, 59 Wis. 364, 18 N. W. Rep. 328; *Town of Cherokee v. Land Co.*, 52 Iowa 279, 3 N. W. Rep. 42; *Truitt v. Baird*, 12 Kan. 420; *City of Seattle, etc., R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. Rep. 738. The ground for these rulings is well expressed in the case last cited, where it is said: "The reason usually assigned for holding such testimony inadmissible, that it raises collateral inquiries which the

York, Pennsylvania, New Jersey, Georgia, Missouri, Minnesota and California.¹ As respects the objection that such evidence is collateral, it may be a sufficient answer that in determining the question as to the value of property, the witnesses must, in their own mental operations, draw largely upon the same collateral considerations. From a practical standpoint it may be urged that while time may be consumed in the introduction of evidence as to the value of other lands, yet the

jury should not be called upon to consider, is, to our minds, unsatisfactory. No witness is competent to testify as to a particular sale who is not personally cognizant of the fact, and, this being so, the character and situation of the land, and all the circumstances surrounding the transaction, may be sought on the examination of such witness, thus enabling the jury, without difficulty, to determine whether or not such sale should be considered a fair criterion of value." Under the rule, as recognized in the above cases, evidence is not competent of prices paid for other land at forced sale. *Peoria, etc., Co. v. Terminal R. Co.*, 146 Ill. 372, 34 N. E. Rep. 550; *Dietrichs v. Lincoln, etc., Co.*, 12 Neb. 225, 10 N. W. Rep. 718. In a suit for timber converted, it was held improper for the defendant to show at what price the plaintiff had settled his action against another trespasser for the taking of like logs. *Tuttle v. White*, 49 Mich. 407, 13 N. W. Rep. 796.

¹ *In re Thompson*, 127 N. Y. 463, 28 N. E. Rep. 389; *East Pennsylvania Railroad v. Hiester*, 40 Pa. St. 53; *Pennsylvania, etc., R. Co. v. Bunnell*, 81 Pa. St. 414; *Montclair R. Co. v. Benson*, 36 N. J. L. 557; *Selma, etc., R. Co. v. Keith*, 53 Ga. 178; *Markowitz v. Kansas City*, 125 Mo. 485, 28 S. W. Rep. 642, 46 Am. St. Rep. 498; *Stinson v. Chicago, etc., R. Co.*, 27 Minn. 284, 6 N. W. Rep. 784; *Central,*

etc., R. Co. v. Pearson, 35 Cal. 247. The objections advanced to the admission of this class of evidence is expressed in the following extract from the opinion in *East Pennsylvania Railroad v. Hiester*, 40 Pa. St. 53: "It did not pretend to fix the market value of the land, but assumed to ascertain by the special, and it may be exceptional, cases named. This would not do, for, if allowed, each special instance adduced on the one side must be permitted to be assailed, and its merits investigated, on the other; and thus there would be as many branching issues as instances, which, if numerous, would prolong the contest interminably. But even this is not the most serious objection. Such testimony does not disclose the probable and general estimate, which in such cases we have seen is a test of value. It would be as liable to be the result of fancy, caprice or folly as of the sound judgment in regard to the intrinsic worth of the subject-matter of it, and consequently would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue involving what another should receive, and, if in no way connected with it, proves nothing. It is therefore improper, irrelevant and dangerous."

very paucity of an opinion, which a skillful cross-examiner will often not permit the witness to reinforce, suggests the necessity of an examination into such collateral instances as are fairly calculated to establish the opinion. If the criterion was inherent value, there could be no warrant for an examination into collateral instances, but as actual sales are at least a part of the *indicia* of market value, evidence of other sales can scarcely be regarded as collateral. In a case where there is no home market, a party seeking to recover damages may offer evidence of values in the nearest general market, if he proposes to accompany his offer by proof of the cost of transportation,¹ and if there is proof that the local market and a distant market are interdependent or sympathetic, no reason in principle would seem to exist why resort should not be had to evidence of values in the latter market, as an element tending to aid the jury in fixing the value in the former market.² In a case where it is necessary to ascertain the value of an article which has no market value, resort may be had to evidence as to what the article sold for at a fair sale.³ Supposed future value, while by no means to be taken as present value, is nevertheless an element which may afford light in the determination of the latter question.⁴

§ 80. **Fraud.**—There is no occasion to cite authorities upon so familiar a proposition as that great latitude is to be allowed to a party in the development of the existence of fraud. “In many

¹ *Union Pacific, etc., R. Co. v. Williams*, 3 Colo. App. 528, 34 Pac. Rep. 731.

² *Harris v. Panama R. Co.*, 58 N. Y. 660, was an action for the killing of a race-horse on the Isthmus of Panama, while in course of transportation to San Francisco. It was held that proof was admissible as to the value of the horse at San Francisco, it appearing that there was no market for such animals upon the Isthmus of Panama.

³ This was the ruling in the case of *Alabama, etc., R. Co. v. Searles*, 69 Miss. 186, 16 So. Rep. 255, where the question was as to the value of damaged oats.

⁴ *Portland, etc., R. Co. v. Inhabitants of Deering*, 78 Me. 61, 2 Atl. Rep. 670, 57 Am. Rep. 784; *Boom Co. v. Patterson*, 98 U. S. 403; *Moulton v. Newburyport Water Co.*, 137 Mass. 163; *Seattle, etc., R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. Rep. 720.

cases," says Grove, J.,¹ "you can only prove fraud by what is behind; the question being one of intention, the motive or the design is the only way of showing fraud." In a fraudulent conveyance case, no question can exist as to the competency of evidence of other fraudulent conveyances made by the grantor at about the time of the execution of the conveyance in question. There is an essential unity in such a series of transactions, for the reason that they are successive steps upon the part of the grantor by which he seeks to render himself proof against execution. But the authorities go still further than this, and authorize the introduction of similar collateral frauds as bearing on the question of the *quo animo*.² As said in a United States case:³ "In actions for fraud large latitude is always given to the admissibility of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another at about the same time, and in relation to a like subject, was actuated by the same spirit."

§ 81. **Resemblance.**—The authorities are by no means agreed as to the right of juries to inspect two persons before them, whose relationship is in question, for the purpose of ascertaining whether there is such a resemblance between them as to justify the inference that they are related to each other. The most careful discussion of this subject is found in the case of *Gaunt v. State*,⁴ where it is said: "In considering the first of these questions, viz., as to the relevancy of resemblance as an element of proof, it is clear that testimony of this character must be treated as a class. Thus viewed, whatever opinion

¹ *Blake v. The Albion Life Assurance Society*, 27 W. Rep. 321, L. R. 4 C. P. D. 94.

² *Benham v. Cary*, 11 Wend. 83; *Jackson v. Timmerman*, 12 Wend. 299; *Cary v. Hotaling*, 1 Hill 311, 37 Am. Dec. 323, and note; *French v. White*, 5 Duer 254; *Wilmot v. Richardson*, 6 Duer 328; *Simmons v. Fay*, 1 E. D. Smith 107; *Heath v. Page*, 63

Pa. St. 108, 3 Am. Rep. 533; *Adams v. Kenney*, 59 N. H. 133; *Day v. Stone*, 59 Tex. 612; *Moline-Milburn Co. v. Franklin*, 37 Minn. 137, 33 N. W. Rep. 323; *Ferbrache v. Martin*, (Idaho) 32 Pac. Rep. 252.

³ *Butler v. Watkins*, 13 Wall. 456.

⁴ *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. Rep. 600.

may be held as to the illusory nature of such evidence in cases like the present [comparing a bastard child with its putative father], there is no question that, as a class, resemblances are admitted wherever relevant. In cases involving handwriting, for instance, it has always been deemed pertinent to have a comparison of hands. Likewise in sales by sample, in patent cases, in trade-mark and infringement suits, resemblance is of the essence of the proof. Nor can it be said that the tendency of recent applications of this rule has been toward restriction—rather the reverse. In the courts of a sister state, New York, operas have been performed in court, and comic songs sung, plagiarized papers have been read, and the so-called materialization of spirits exhibited—all within the scope of the doctrine of the relevancy of resemblance. * * * The extension of this rule to cases of family likeness in bastardy and other suits of alleged parentage can not be questioned seriously on principle; the illusory nature of such resemblances rather imposing a duty on the court in conjunction with the admission of the proof than militating against the relevancy of the inquiry.” In the notorious Douglass Case, House of Lords, 1769, Lord Mansfield allowed the resemblance of the appellant and his brother to Sir John Stewart and Lady Jane Douglass to be shown, as well as the dissimilarity of the former persons to the persons whose children they were supposed to be; while as late as 1871, Lord Chief Justice Cockburn, in the Tichborne Case, held that the resemblance of the claimant to the family of Roger Tichborne was relevant, and intimated that a comparison of features between the claimant and the sisters of Arthur Orton would be permitted. The courts, so far as they have had occasion to pass on the question, for the most part hold that the fact of resemblance is a circumstance which may be considered as bearing on the question of relationship.¹ Some of the cases

¹Scott v. Donovan, 153 Mass. 378, Hun 11, 22 N.Y. Supp. 634; Shorten v. 26 N. E. Rep. 871; Finnegan v. Duggan, 14 Allen 197; Gilmanton v. Ham, 38 N. H. 108; Udderzook v. Com., 76 Pa. St. 340; People v. Webster, 68 Judd, 56 Kan. 43, 42 Pac. Rep. 337; Jones v. Jones, 45 Md. 144; State v. Woodruff, 87 N. C. 89.

deny the application of this proposition where one of the persons, with whom it is proposed to institute the comparison, is a very young child.¹ In a Mississippi case,² where the question arose as to whether the defendant was a colored man, the court held that the inspection did away with the necessity of proof, saying: "Juries may use their eyes as well as their ears." In a North Carolina case,³ it was held, in the determination of the question as to whether a girl was of mixed blood, that the plaintiff had a right to exhibit her to the jury.

§ 82. *Maps and photographs.*—A sketch of a *locus in quo*, although not mathematically accurate, is competent, where it will assist the jury in locating the various objects under inquiry.⁴ Upon the same principle, whenever it is important to portray a *locus in quo*, or to show the character of an object which can not be conveniently brought into court, it is permissible to put in evidence a photograph of it.⁵ Such evi-

¹ *State v. Danforth*, 48 Iowa 43; 30 Am. Rep. 387; *Hanawalt v. State*, 64 Wis. 84, 24 N. W. Rep. 489, 54 Am. Rep. 588; *Risk v. State*, 19 Ind. 152. The ground of these decisions is thus expressed in *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. Rep. 56, 6 Am. St. Rep. 221: "In a case like this, where the child was a mere infant, such evidence is too vague, uncertain and fanciful, and, if allowed, would establish not only an unwise, but dangerous and uncertain, rule of evidence. While it may be a well-known physiological fact that peculiarities of form, feature and personal traits are oftentimes transmitted from parent to child, yet it is equally true, as a matter of common knowledge, that during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and ap-

pearance during that period." In other states it is held that the youth of the child goes only to the weight of the evidence. *Scott v. Donovan*, 153 Mass. 378, 26 N. E. Rep. 871; *Gaunt v. State*, 50 N. J. L. 490, 14 Atl. Rep. 600.

² *Garvin v. State*, 52 Miss. 207.

³ *Warlick v. White*, 76 N. Car. 175.

⁴ *Brown v. Galesburg Pressed Brick Co.*, 132 Ill. 648, 24 N. E. Rep. 522.

⁵ *Archer v. New York, etc., R. Co.*, 106 N. Y. 589, 13 N. E. Rep. 318; *People v. Jackson*, 111 N. Y. 362, 19 N. E. Rep. 54; *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77, 23 N. E. Rep. 35; *People v. Fish*, 125 N. Y. 136, 26 N. E. Rep. 319; *People v. Webster*, 139 N. Y. 73, 34 N. E. Rep. 730; *Cooper v. St. Paul City R. Co.*, 54 Minn. 379, 56 N. W. Rep. 42; *Locke v. S. C. & P. R. Co.*, 46 Iowa 109; *Redden v. Gates*, 52 Iowa 210, 2 N. W. Rep. 1079; *Barker v. Town of Perry*, 67 Iowa 146, 25 N. W. Rep. 100; *State v. O'Reilly*, 126 Mo. 597, 29 S. W. Rep.

dence is sometimes competent, after proper preliminary proof, where the original object is present, as where a signature, the genuineness of which is in question, is photographed upon a larger scale to show the peculiarities of the handwriting. In such a case the camera serves in some degree the function of the microscope.¹ Photographs can not be introduced until they are proved to be correct.² As observed by the court in a Maryland case:³ "As a general rule, in proportion as the *media* of evidence are multiplied, the chances of error or mistake are increased." For this reason, photographs, as ordinarily used in evidence, are to be treated as secondary proof, and as not admissible when the original can reasonably be produced in court.⁴ Thus, in a Texas case,⁵ where witnesses had testified in a deposition to their familiarity with the handwriting of certain persons, and to their belief that certain photographs exhibited to them were photographic

577; *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748; *Luke v. Calhoun County*, 52 Ala. 115; *Blair v. Pelham*, 118 Mass. 420; *Marcy v. Barnes*, 16 Gray 161, 77 Am. Dec. 405; *Church v. City of Milwaukee*, 31 Wis. 512; *Dyson v. New York, etc., R. Co.*, 57 Conn. 10, 17 Atl. Rep. 137, 14 Am. St. Rep. 82; *Kansas City, etc., R. Co. v. Smith*, 90 Ala. 25, 8 So. R. 43; 31 Cent. L. J. 416.

¹ *Marcy v. Barnes*, 16 Gray 161, 77 Am. Dec. 405.

² *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. Rep. 783; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Buzard v. McNulty*, 77 Tex. 438, 14 S. W. Rep. 138; *Ortiz v. State*, 30 Fla. 256, 11 So. Rep. 611; *State v. O'Reilly*, 126 Mo. 597, 29 S. W. Rep. 577; *Kansas City, etc., R. Co. v. Smith*, 90 Ala. 25, 8 So. Rep. 43, 24 Am. St. Rep. 753. The preliminary question as to the verification of photographs is addressed to the court. *Cleveland, etc., R. Co. v. Monaghan*, 140 Ill. 474, 30 N. E. Rep. 869. In *People v. Jackson*, 111 N. Y. 362, 19 N. E. Rep. 54, a homicide

case, it was held proper to introduce a picture of the *locus in quo*, although the photographer had taken the picture with other persons standing at the places where the evidences showed the actors in the affair stood.

³ *Tome v. Parkersburg, etc., R. Co.*, 39 Md. 36, 17 Am. Rep. 540.

⁴ *Foster's Will*, 34 Mich. 23; *Tome v. Parkersburg, etc., R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Miller v. Johnson*, 27 Md. 6; *White S. M. Co. v. Gordon*, 124 Ind. 495, 24 N. E. Rep. 1053, 19 Am. St. Rep. 109. In *Leathers v. Salver Wrecking Co.*, 2 Woods (C. C.) 680, where the originals were archives of the government, and could not be produced, Judge Bradley, in speaking of the photographic copies which were admitted, said: "No better evidence of their character and authenticity can be had than such a reproduction of them by the operation of natural agencies."

⁵ *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315.

copies of such handwriting, it was held that such evidence was not admissible, because it was not a fact that the exactness of such handwriting was as certain as the original, and for that reason the evidence was regarded as secondary.¹ It was held in a Massachusetts case,² that where other evidence could be produced as to the physical condition of plaintiff (as to health, strength and agility) it was within the discretion of the court to reject a photograph offered in evidence, as courts are not required to try such questions by comparisons. A photographic likeness may be used for the purpose of identification, where no better evidence can be had.³

§ 83. **Evidence in aggravation.**—In actions for tort, it may be said that all of the circumstances surrounding the transaction, and, unless some question of pleading arises, all of the consequences, may be shown, except where such consequences are too remote to warrant the assessment of damages.

§ 84. **Evidence in mitigation.**—Any circumstance, otherwise competent in evidence to reduce damages, may be proved, although it may have come into existence after the commencement of the action.⁴ It has been held that, in a suit for breach of promise to marry, it was competent to show the licentious or improper conduct of the plaintiff, not only before but subsequent to the breaking of contract.⁵ It was held, however, in a Minnesota case of the same character, that it was not

¹ In the brief of counsel in the case last cited, it is said that the camera is "but the handwriting of nature, preserved by nature's camera;" that "until photography was discovered nothing in nature was exactly like any other thing, except that thing's image reflected in a polished surface, which disappeared when the object was removed. Science now steps forward and relieves the difficulty, by making permanent and materializing with minute exactness the reflected image."

² *Gilbert v. West End St. R. Co.*, 160 Mass. 403, 36 N. E. Rep. 60.

³ *Udderzook v. Com.*, 76 Pa. St. 340. See *State v. Windahl*, (Iowa) 64 N. W. Rep. 420; *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. Rep. 783.

⁴ *Marsh v. McPherson*, 105 U. S. 709.

⁵ *Willard v. Stone*, 7 Cowen 22, 17 Am. Dec. 496; *Johnson v. Caulkins*, 1 Johns. Cas. 116, 1 Am. Dec. 102. But see 2 Am. Dec. 122.

competent for the defendant to show that some two weeks after the plaintiff was informed of the defendant's marriage to another she sought him out and shot him.¹ The general rule is that to make evidence of provocation admissible, it must fall within the *res gestæ*. Thus, in a civil action for an assault and battery, the fact of provocation can not be shown by the defendant, unless it was so recent as to warrant an inference that the act was committed under the immediate influence of the passion thus wrongfully excited.² The fact that the parties fought by agreement may be shown, at least for the purpose of reducing the amount of punitive damages.³ The most of the cases in which the question has been decided hold that such evidence is not admissible to reduce compensatory damages,⁴ but it is held in New York and Pennsylvania that in cases like the above the evidence may be received to diminish the actual damages, since the right to sue at all in such a case grows out of public considerations, and not because of any tenderness for the plaintiff.⁵ The subject of the admissibility of proof, in suits for defamation, of the general bad reputation of the plaintiff, for the particular trait of character which the slander or libel involves, will be considered in another connection.⁶

¹ Schmidt v. Durnham, 46 Minn. 227, 49 N. W. Rep. 126. Atl. Rep. 1008, 30 Am. St. Rep. 413; Adams v. Waggoner, 33 Ind. 531;

² Bonino v. Caledonio, 144 Mass. 299, 11 N. E. Rep. 98; Lee v. Woolsey, 19 Johns. 319, 10 Am. Dec. 230; Millard v. Truax, 84 Mich. 517, 47 N. W. Rep. 1100, 22 Am. St. Rep. 705; Waters v. Brown, 3 A. K. Marsh. 557; Barry v. Inglis, 1 Hayw. 402; Ireland v. Elliott, 5 Iowa 478, 68 Am. Dec. 715; Avery v. Ray, 1 Mo. 12; Cox v. Whitney, 9 Mo. 531; Gonzales v. State, 31 Tex. 495. See Baltimore, etc., R. Co. v. Barger, 80 Md. 23, 30 Atl. Rep. 560, 45 Am. St. Rep. 319. Logan v. Austin, 1 Stew. (Ala.) 476; Bell v. Hansley, 3 Jones (N. Car.) 131; Shay v. Thompson, 59 Wis. 540, 18 N. W. Rep. 473, 48 Am. Rep. 538; Corcoran v. Harran, 55 Wis. 120; Bartholt v. Wright, 45 Ohio St. 177, 12 N. E. Rep. 185, 4 Am. St. Rep. 535.

⁴ See cases cited in last section.

⁵ Kiff v. Youmans, 86 N. Y. 324, 40 Am. Rep. 543; Robison v. Rupert, 23 Pa. St. 523. See Baltimore, etc., R. Co. v. Barger, 80 Md. 23, 30 Atl. Rep. 560, 45 Am. St. Rep. 319.

⁶ Grotton v. Glidden, 84 Me. 589, 24

⁶ Post, Chap. X.

§ 85. **Scientific books—Life tables.**—If a fact is established by one of the exact sciences, the court is at liberty to consult a recognized authority upon the subject, and no reason exists why such authority should not be read to the jury. But in the field of the inductive sciences, it is not ordinarily competent to read from even the most approved and advanced authority. This statement has especial application to medical books. Judges and juries are without that foundation in experience which would enable them to judge between authorities. The statement of an induction may have become recognized in the medical profession, in the light of a corrected and expanded *data*, as fallacious; and a layman may well refuse to accept the most advanced scientific thought, if he observes that many men, who are skilled in the particular science, do not yet receive that induction as truth. Again, the statements of an author, upon a matter of uncertain inference, are open to the objection that they are made without the sanction of an oath, and they also lack that important test of truth, cross-examination. It is therefore the law that medical books are not evidence.¹ It is not even competent to get before the jury the statement of a medical authority by asking an expert, if such statement agrees with his views.² But it is competent to read to an expert on his cross-examination contradictory statements from medical books,³ and, *a fortiori*, when he refers

¹ *Gallagher v. Market St. R. Co.*, 67 Cal. 13, 6 Pac. Rep. 869, 56 Am. Rep. 713; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *Ashworth v. Kitt-ridge*, 12 Cush. 193, 59 Am. Dec. 178; *Com. v. Wilson*, 1 Gray 337; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *People v. Hall*, 48 Mich. 482, 12 N. W. Rep. 665, 42 Am. Rep. 477; *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. Rep. 862; *Epps v. State*, 102 Ind. 539, 1 N. E. Rep. 491; *Carter v. State*, 2 Ind. 617; *Melvin v. Easley*, 1 Jones' Law 386, 62 Am. Dec. 171; *Johnson v. Richmond, etc., R. Co.*, (Ga.) 22 S. E. Rep. 694; *Fowler v. Lewis*, 25 Tex. 380; *St. Louis, etc., R. Co. v. Jones*, (Tex.) 14 S. W. Rep. 309; *Boehringer v. A. B. Richards Medical Co.*, (Tex. Civ. App.) 29 S. W. Rep. 508.

² *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *State v. Winter*, 72 Iowa 627, 34 N. W. Rep. 475; *Marshall v. Brown*, 50 Mich. 148, 15 N. W. Rep. 55; *People v. Millard*, 53 Mich. 63, 18 N. W. Rep. 562. In the case last cited it is stated that attempts to evade the excluding rule by examining or cross-examining in such a way as to get books before the jury should not be permitted.

³ *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. Rep. 862; *Marshall v.*

to them as authority.¹ In such instances, the book can not serve the function of substantive evidence, but it is read to the witness to enable the jury to observe the manner in which he bears up under the assault of the cross-examination. There is authority, however, for permitting a medical witness to state what the books lay down as authority in substantiation of his opinion.² A marked exception to the rule excluding the inductive conclusions of writers exists with reference to the use of life-tables, to prove the average expectancy of human life in its various periods. The observation of the unlimited *data* upon this subject has been so considerable that the courts feel warranted in receiving this class of evidence in proper cases. Such tables are not to be treated as precise mathematical rules, binding on the jury, in deciding a question involving so many contingencies. Each individual case depends on its own circumstances.³ The Carlisle table has been frequently held admissible by the courts,⁴ and as it was not based on selected

Brown, 50 Mich. 148, 15 N. W. Rep. 55. on books, as a part of his general knowledge.

¹Gallagher v. Market St. R. Co., 67 Cal. 13, 6 Pac. Rep. 869, 56 Am. Rep. 713; Pinney v. Cahill, 48 Mich. 584, 12 N. W. Rep. 862; City of Ripon v. Bittel, 30 Wis. 614; Huffman v. Click, 77 N. Car. 55.

²In Healy v. Visalia, etc., R. Co., 101 Cal. 585, 36 Pac. Rep. 125, it was held that a doctor, who was being examined as to the probable effect of an injury to the head, might properly state that there are cases on record in which such injuries have produced death. This ruling is put on the ground that what the witness said "must be assumed to have been a conclusion reached by him after a judicious comparison of all that he had read or learned upon the subject." In Collier v. Simpson, 5 Car. & P. 73, it was held that a witness, who was president of a medical college, could state, not only his judgment, but the grounds of it, which were in some degree founded

³Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. Rep. 1; Steinbrunner v. Pittsburg, etc., R. Co., 146 Pa. St. 504, 23 Atl. Rep. 239, 28 Am. St. Rep. 806. In Shippen & Robins's Appeal, 80 Pa. St. 391, these tables were held not authoritative in determining the value of a life estate, and the common law rule of estimating it at one-third the capital sum was adopted.

⁴Steinbrunner v. Pittsburg, etc., R. Co., 146 Pa. St. 504, 23 Atl. Rep. 238, 28 Am. St. Rep. 806; Shover v. Myrick, 4 Ind. App. 7, 30 N. E. Rep. 207; Louisville, etc., R. Co. v. Miller, 141 Ind. 533, 37 N. E. Rep. 343; Donaldson v. Mississippi, etc., R. Co., 18 Iowa 280, 87 Am. Dec. 391; McDonald v. Chicago, etc., R. Co., 26 Iowa 124, 95 Am. Dec. 114; Walters v. Chicago, etc., R. Co., 41 Iowa 71; City of Friend v. Ingersoll, 39 Neb. 717, 58 N. W. Rep. 281.

lives, it may properly be treated as evidence of the average expectancy.¹

§ 86. **View and inspection.**—Provision for the jury inspecting the vicinage in proper cases is generally a matter of statutory regulation. Such inspection is not ordinarily regarded as evidence *per se*, but as an aid to the application of the evidence. It is proper to put in evidence articles of clothing, tools, and, in fact, any object forming a part of the *res gestæ*.² It is proper to permit a plaintiff in a personal injury case to exhibit his injuries to the jury.³ There are a number of cases which deny that courts have the power to compel a plaintiff to expose his person. The leading case to this effect is *Union Pacific R. Co. v. Botsford*,⁴ in which Mr. Justice Gray, in pronouncing the judgment of the court, says: "No right is more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. * * The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order of process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down

¹ *Steinbrunner v. Pittsburg, etc., R. Co.*, 146 Pa. St. 504, 23 Atl. Rep. 238, 28 Am. St. Rep. 806. An explanation of the formation of this table will be found in the *Encyclopedia Britannica*, vol. 13, p. 169.

² *People v. Larned*, 7 N. Y. 445; *People v. Buddensieck*, 103 N. Y. 487, 9 N. E. Rep. 44, 57 Am. Rep. 766; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Tudor Iron Works v. Weber*, 129 Ill. 535, 21

N. E. Rep. 1078. In *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. Rep. 947, it was held proper to put the model of a scaffold in evidence.

³ *Mulhado v. R. Co.*, 30 N. Y. 370; *Hess v. Lowery*, 122 Ind. 225, 23 N. E. Rep. 156, 17 Am. St. Rep. 355; *Citizens' St. R. Co. v. Willoeby*, 134 Ind. 563, 33 N. E. Rep. 627.

⁴ *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. Rep. 1000.

from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."¹ Notwithstanding this adjudication by the Supreme Court of the United States, it must be affirmed, according to the great weight of American authority, that, while the right to claim an examination of the plaintiff's person is not co-extensive with the power of cross-examination, and, while the request may be denied without error except in case of abuse of discretion, the power to order an examination of the plaintiff's person in a personal injury case exists in the trial court.² The leading authority in support of this view is *Schroeder v. Chicago, etc., R. Co.*³ In that case the court said: "It is said that the examination would have subjected him to danger of his life, pain of body and indignity to his person. The reply to this is that it should not, and the court should have been careful to so order and direct. * * * As to the indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies, and it is never esteemed a dishonor or indignity."

¹ To the same effect see *Penn. Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. Rep. 860; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Sioux City and P. R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. Rep. 860, 49 Am. Rep. 724; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. Rep. 419.

² *Welsh v. Sayre*, 52 How. Pr. 334; *Shaw v. Van Rensselaer*, 60 How. Pr. 143; *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 22 N. W. Rep. 176, 53 Am. Rep. 14; *Richmond, etc., R. Co. v. Childress*, 82 Ga. 719, 9 S. E. Rep. 602, 14 Am. St. Rep. 189; *Shepard v. Mo. Pac. R. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Loyd v. R. Co.*, 53 Mo. 509; *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 400, 4 S. W. Rep. 701, 3 Am. St. Rep. 549; *Turnpike Co. v. Baily*, 37 Ohio St. 104; *International, etc., R. Co. v. Underwood*, 64 Tex. 463; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. Rep. 325; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 50 Am. Rep. 154.

³ *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375.

The court further said: "To our minds the proposition is plain, that a proper examination by learned and skilled physicians and surgeons would have opened a road by which the cause would have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his control testimony which would have revealed the truth more closely than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it." In a Georgia case,¹ the court said: "As to the suggestion made in argument, that

¹ *Richmond, etc., R.Co. v. Childress*, 82 Ga. 719, 9 S. E. Rep. 602, 14 Am. St. Rep. 189. In *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. Rep. 325, the court said that if a committee to examine the plaintiff can be appointed at all, it should be appointed of one or more disinterested experts of the court's selection, except where the parties agree upon them. It was held in *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375, that the court might properly make an order for the examination of the plaintiff, out of the presence of the jury, by a number of physicians selected in equal number by both sides. In *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629, 55 Am. Rep. 390, the court said: "The examination asked by the defendant was unreasonable, in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by three." See *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 400, 4 S. W. Rep. 701, 3 Am. St. Rep. 549. Where the request was to turn the plaintiff's person over for an examination by defendant's physicians alone, it was held that the request was properly refused. *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. Rep. 860, 49 Am. Rep.

724. In *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 22 N. W. Rep. 176, 53 Am. Rep. 14, while the power upon the part of the trial court is affirmed, to compel the plaintiff to do some physical act in the presence of the jury, to illustrate or show the extent of the injuries complained of, yet it was held that the court below was warranted in refusing to require the plaintiff to walk across the court-room so that it might be observed as to whether she limped. Where a suit against a life insurance company had been pending eighteen months, it was held that it was not error to refuse the application of the insurance company for leave to exhume the body, in support of the claim that the skull of the deceased had been fractured and had healed by the operation of trephining. The court did not indicate the rule where the application is timely, but it characterized the effort, in the application before it, as "repugnant to the best feelings of our nature, and likely to be in many cases so abhorrent to the sensibilities of the surviving relatives that they would prefer an abandonment of the suit to a compliance with the order. *Grangers' Life Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446.

the rule would operate hardly upon delicate and modest females, we can only say that they would be guarded by the discretion of the trial judge. There would be no danger, we think, in this country, of an examination being ordered needlessly, or where an improper shock to modesty or feeling of delicacy would be likely. We decide simply that the power exists, and that in such case it is to be exercised or not, according to the sound discretion of the presiding judge." The existence of this power has been affirmed upon the ancient practice of courts to require parties to submit to examinations in inquiries as to impotency, and it has also been likened to the power of a court to compel a discovery of books and papers. It ought not to be a doubtful proposition, however, that a court, from whom a recovery is sought, has power to protect *itself*, to say nothing of the defendant, against imposture. As an authority somewhat apropos to this discussion, although it is not to be given an unrestrained application in this direction, attention may be called to the case of *Bryant v. Stillwell*.¹ The action in that case was by a contractor on a building contract. The defense was improper construction. The plaintiff had sent a man to the house to examine it as a witness. In ruling upon the question as to the right of the defendant to exclude the witness, Black, J., said: "To smother evidence is not much better than to fabricate it. * * * It ought to be understood that where one party has the subject-matter of the controversy under his exclusive control, it is never safe to refuse the witnesses on the other side an opportunity to examine it, unless he is able to give a very satisfactory reason. Here there was no ground to believe that the witness would misrepresent what he might see. If the defendant had felt such a suspicion, he could have shown the house to as many others as he chose, and overwhelmed the perjured one by a host of honest ones."

§ 87. Inspection of defendant and his belongings in criminal case.—The courts have in many instances had pressed upon their consideration the question as to whether the constitutional

¹ *Bryant v. Stillwell*, 24 Pa. St. 314.

provisions against unreasonable searches and seizures, and against compelling a person in a criminal case to give evidence against himself, should be so construed as to preclude the reception of evidence illegally obtained. There is, however, little or no disagreement upon the authorities respecting this question. The courts will not use their own powers or process to obtain such evidence. They will not permit a person on trial for crime to be even called on, during the trial, to indulge in any experiments designed to establish his identity as the criminal.¹ The right to interrogate him as to personal characteristics is somewhat broader, however, in the writer's judgment, where the defendant elects to go upon the stand as a witness. If a trial court, by the use of its own process, obtains evidence against a defendant in a criminal case, the evidence thus obtained can not be used. Thus, where a woman was charged with infanticide it was held that a physician could not testify to the fact that the defendant had been recently delivered of a child, it appearing that he had obtained his information by an examination of the defendant's person, while he was acting as a member of a commission appointed by the court to make such examination.² Although quite variant in its facts from the case last cited, the case of *Boyd v. United States*³ arranges itself within the same principle. It was there held that the constitutional rights of a defendant in a criminal case might be violated by obtaining incriminating evidence from him under the morally compulsory process of a *subpœna duces tecum*. But in cases where evidence has been obtained by the

¹ *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717; *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72; *State v. Jacobs*, 5 Jones' L. (N. Car.) 259. In *State v. Prudhomme*, 25 La. Ann. 523, it was held proper to compel a defendant to take his feet from under the chair in which he was sitting, in order that the jury might by inspection determine whether his feet were about the size of the tracks found. It was held by a

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divided court in Nevada that it was not error to compel the defendant to exhibit a tattoo mark on his arm. *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530.

² *People v. McCoy*, 45 How. Pr. 216, and see *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. Rep. 1009, 43 Am. St. Rep. 446.

³ *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524.

wrongful act of officials or third persons, under circumstances not charging the court with responsibility for the acts by which the evidence was obtained, the rule is that such evidence is not thereby rendered incompetent.¹ An Alabama case² gives careful consideration to this subject, and also quotes approvingly the following, from the opinion of the Supreme Court of New Hampshire in *State v. Flynn*:³ "It seems to us an unfounded idea that the discoveries made by the officers and their assistants in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud access is gained to them, and they are examined, to see what evidence they bear. That evidence is their's, not their owner's. If a party should have the power to keep out of sight or out of reach persons who can give evidence of facts he desires to suppress, and he attempts to do that, but is defeated by force or cunning, the testimony given by such witnesses is not his testimony, nor evidence, which he has been compelled to furnish against himself. It is their own." A Texas case⁴ carries the doctrine of the above case so far as to hold evidence admissible against a

¹ *Com. v. Dana*, 2 Metc. 329; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. Rep. 910; *Com. v. Byrnes*, 158 Mass. 172, 33 N. E. Rep. 343; *State v. Flynn*, 36 N. H. 64; *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. Rep. 1009, 43 Am. St. Rep. 446; *Gindrat v. People*, 138 Ill. 103, 27 N. E. Rep. 1085; *Siebert v. People*, 143 Ill. 571, 32 N. E. Rep. 431; *State v. Graham*, 74 N. Car. 646, 21 Am. Rep. 493; *Chastang v. State*, 83 Ala. 29, 3 So. Rep. 304; *Walker v. State*, 7 Tex. Cr. App. 245, 32 Am. Rep. 595; *Shields v. State*, 104 Ala. 35, 16 So. Rep. 85; *Bruce v. State*, 31 Tex. Cr. App. 590, 21 S. W. Rep. 681; *Legatt v. Tollervey*, 14 East 302; *Jordan v. Lewis*, 14 East 306, note.

² *Shields v. State*, 104 Ala. 35, 16 So. Rep. 85.

³ *State v. Flynn*, 36 N. H. 64.

⁴ *Walker v. State*, 7 Tex. Cr. App. 245, 32 Am. Rep. 595.

prisoner which was produced by him upon the requirement of the examining magistrate.¹ This is at least doubtful, for while the defendant is not technically on trial before the magistrate, yet the inquiry is a judicial one, and it is as much a reproach to the law to sanction the adoption of such methods, to obtain evidence in a criminal case, upon the part of a minor judicial officer, as it would be to wink at like acts if they were resorted to by the judge before whom the defendant was ultimately tried.

Collateral Questions Relative to the Examination of Witnesses.

§ 88. **Right to show circumstance by which witness remembers.**—It is an unsettled question, upon the authorities, as to the right of a party to show a collateral circumstance or remark because his witness asserts that such circumstance or remark tends to establish his recollection. The authorities against the proposition,² and those affirming the existence of such a right,³ seem to be about evenly balanced. Although no authority can be cited in support of the distinction, it is the writer's view, where a witness testifies to a mere negative, under circumstances which imply a doubt as to his recollection, that the party producing the witness ought to be permitted to show why he remembers. It is to be recollected that it is a proposition of law that, all other things being equal, particularly in a matter where there was room for inattention, positive evidence is entitled to greater weight than negative evidence, for the reason that it is possible to forget a thing that did happen, while it is not possible to remember a thing that never exist-

¹ A like ruling was made in a case where the disclosure was made upon the requirement of a coroner. *State v. Garrett*, 71 N. Car. 85, 17 Am. Rep. 1.

² *Delano v. Smith Charities*, 138 Mass. 63; *Sanborn v. Detroit B. C. & A. R. Co.*, 99 Mich. 1, 57 N. W. Rep. 1047; *Cherry v. Butler*, 4 Tex. App. (Civ. Cas.) 7, 17 S. W. Rep. 1090.

³ *Louisville, etc., R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. Rep. 218; *Thompson on Trials*, § 373, citing *Platner v. Platner*, 78 N. Y. 90; *O'Hagan v. Dillon*, 76 N. Y. 170; *Abbott's Pr. Brief*, citing *Blackwell v. Hamilton*, 47 Ala. 472; *Angell v. Rosenbury*, 12 Mich. 241.

ed;¹ indeed there are authorities going so far as to announce, where the question is as to whether a signal was given by a railway train, in the absence of special circumstances, inducing a reasonable inference that the witness would have heard and noted the fact of the signal, if it had been given, that his testimony that it was not given will not create more than a scintilla of evidence, which the judge may disregard for the purpose of directing a verdict.² In instances like this, the party producing a witness ought to be allowed to substantiate his testimony, by showing, at least in outline, the happening of a contemporaneous circumstance which impressed the fact he testifies to upon the tablets of his memory.

§ 89. Right of party producing witness to prove his contradictory statements out of court.—If a party voluntarily introduces a witness, his act carries with it the implication that upon the point on which he produces him, at least, the witness is entitled to credence. While there are authorities which hold that where it appears to the court that a party has been entrapped by his witness, the court may permit such party to impeach his witness,³ yet the common law rule, and

¹ *Stitt v. Huidekopers*, 84 U. S. 385; *Hauser v. Central, etc., R. Co.*, 147 Pa. St. 440, 23 Atl. Rep. 766; *Sanborn v. Detroit B. C. & A. R. Co.*, 99 Mich. 1, 57 N. W. Rep. 1047; *Crane v. Michigan Central, etc., R. Co.*, (Mich.) 65 N. W. Rep. 527; *Hepburn v. Citizens' Bank*, 2 La. Ann. 1007, 46 Am. Dec. 564; *Draper v. Baker*, 61 Wis. 450, 21 N. W. Rep. 527, 50 Am. Rep. 143; *Ralph v. Chicago, etc., R. Co.*, 32 Wis. 177, 14 Am. Rep. 725; *Ford v. Central, etc., R. Co.*, 69 Iowa 627, 21 N. W. Rep. 587; *Isaacs v. Skrainka*, 95 Mo. 517, 8 S. W. Rep. 427; *Murray v. Missouri Pacific, etc., R. Co.*, 101 Mo. 236, 13 S. W. Rep. 817, 20 Am. St. Rep. 601; *Cunningham v. State*, 5 Tex. 440; *Paschal v. Perez*, 7 Tex. 348; *Willis v. Lewis*, 28 Tex. 185.

² *Hauser v. Central, etc., R. Co.*, 147 Pa. St. 440, 23 Atl. Rep. 766; *Sanborn v. Detroit, B. C. & A. R. Co.*, 99 Mich. 1, 57 N. W. Rep. 1047.

³ *Cowden v. Reynolds*, 12 Serg. R. 281; *Bank v. Davis*, 6 Watts & S. 285; *Smith v. Briscoe*, 65 Md. 561, 5 Atl. Rep. 334; *Moore v. Railroad*, 59 Miss. 243; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744. See *Wright v. Beckett*, 1 Moody & R. 414. In England, and in some of the states, it is provided by statute that a witness who is called by a party and testifies adversely to his interest, may be contradicted by his prior statements. But these statutes do not authorize proof of prior statements, where the witness merely fails to testify to anything helpful to the cause of the party calling him. *Adams*

the weight of authority in America, is against this proposition, which means that a party may introduce a witness upon a point—thereby impliedly saying to the court and jury, this, my witness, is a person whose word is entitled to weight upon the point on which I call him—while the party is at the time prepared to destroy the word of the witness if he testifies contrary to the party's claim.¹ Moreover, a rule which would permit a party to contradict his witness is open to the objection that a designing party might by collusion with his witness get in evidence statements made out of court by him for the very purpose of being repeated upon the stand.² But while a party can not impeach his own witness by the use of independent impeaching testimony, yet it is pretty generally agreed that if a witness testifies adverse to the party who produced him, the latter may ask the witness as to prior statements in contradiction of his testimony. This may be done, not with a view to impeachment by other evidence, but in an

v. State, 28 Fla. 511, 15 So. Rep. 905; *Hull v. State*, 93 Ind. 128; *Champ v. Com.*, 2 Met. (Ky.) 17, 74 Am. Dec. 388; *Blough v. Parry*, — Ind. 463, 40 N. E. Rep. 70.

¹ *Buller's N. P.* 297; *Best on Ev.*, § 645; *Coulter v. American Mer. Union Exp. Co.*, 56 N. Y. 585; *Adams v. Wheeler*, 97 Mass. 67; *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583, and cases cited; *Hildreth v. Aldrich*, 15 R. I. 163, 1 Atl. Rep. 249; *State v. Vickers*, 47 La. Ann. —, 18 So. Rep. 639; *People v. Jacobs*, 49 Cal. 384; *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34, 13 So. Rep. 130.

² But there is no objection to a party contradicting his witness by other original testimony. It is one thing to affirm that a party shall not introduce evidence which could only be claimed to be admissible as impeaching, while it would be a different thing, and a perversion of justice, to hold that a tricky witness might com-

mit a party to a certain theory of the facts beyond the hope of successful refutation. *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260; *Snell v. Gregory*, 37 Mich. 500; *Norwood v. Kenfield*, 30 Cal. 393. The authorities agree that where a party is bound to call a particular witness to satisfy the demands of the law, as the subscribing witness to a will, such party may impeach the witness, if he testifies adversely. *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583; *Thornton v. Thornton*, 39 Vt. 122; *Dennett v. Dow*, 17 Me. 19; *Harden v. Hayes*, 9 Pa. St. 151; *Coulter v. Am., etc., Express Co.*, 56 N. Y. 585; *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. Rep. 87; *Olinde v. Saizan*, 10 La. Ann. 153; *State v. Vickers*, 47 La. Ann. —, 18 So. Rep. 639; *Williams v. Walker*, 2 Rich. Eq. (S. Car.) 291, 46 Am. Dec. 53; *Whitman v. Morey*, 63 N. H. 448, 2 Atl. Rep. 899.

effort to show the witness that he is mistaken, and to induce him, by the refreshing of his recollection, to change his testimony, and in order, some of the authorities add, to set the party right before the jury.¹

§ 90. **Collateral matters on cross-examination.**—While the direct examination must be confined to evidence which is relevant,² the cross-examination is in some respects much less circumscribed. Even here, however, it is necessary, to prevent the obscuration of the issue, to keep the examination from extending into matters purely collateral. With reference to cross-examination, however, it is to be recollected that the witness's statements on his direct examination are to be tested, and the legitimate effort to do so is not collateral in the sense of being incompetent. Perhaps as luminous a statement of the law upon this subject as can be compacted within a few lines is found in a California case,³ where it is said: "Undoubtedly the cross-examination can not go beyond that matter [the subject-matter of the examination-in-chief], but it ought to be allowed a very free range within it. In order to do this, the witness may be sifted as to every fact touching the matters as to which he testifies, so that his temper, leanings, relations to the parties and the cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his means of knowledge, his general and particular acquaintance with the subject-matter, may be fully tested."⁴ While the

¹ Bullard v. Pearsall, 53 N. Y. 230; Cox v. Eayres, 55 Vt. 24, 45 Am. Rep. 583; Hildreth v. Aldrich, 15 R. I. 163, 1 Atl. Rep. 249; Louisville, etc., R. Co. v. Hurt, 101 Ala. 34, 13 So. Rep. 130; State v. Vickers, 47 La. Ann. —, 18 So. Rep. 639; White v. State, 87 Ala. 24, 5 So. Rep. 829; People v. Jacobs, 49 Cal. 384; State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241; State v. Sorter, 52 Kan. 531, 34 Pac. Rep. 1036; Melhuish v. Collier, 15 Q. B. 878. The application of this rule is denied in cases where the testimony of the witness upon the stand is not prejudicial to the party calling him. White v. State, 87 Ala. 24, 5 So. Rep. 829; Arnold v. State, (Wyo.) 40 Pac. Rep. 967.

² Art. 127, Stephen's Dig. Law of Ev.

³ Jackson v. Feather, etc., Water Co., 14 Cal. 19.

⁴ Quoted approvingly in Wendt v. Chicago, etc., R. Co., 4 S. Dak. 476, 57 N. W. Rep. 226. See Schuster v. State, 80 Wis. 107, 49 N. W. Rep. 30.

breadth of cross-examination is to some extent a matter of discretion upon the part of the court, yet it may be said that in the sifting of the testimony of a witness upon cross-examination, in order to ascertain its probative force, the law favors a slack rather than a taut rein.¹ It is especially the rule to allow great latitude where the evidence comes from an untrustworthy source, as from an accomplice.² In England, and in some of the states, the court may permit counsel, on cross-examination, to go into the whole case with a witness, but this is not the general rule.³ The rule respecting collateral matters is that, with certain exceptions, if a party cross-examines respecting them, he is not at liberty to introduce evidence to the contrary; and it may be added, that he can not impeach upon a collateral issue. The test of whether a fact inquired of on cross-examination is collateral, is this: Would the cross-examining party be entitled to go into such matter on his case in chief? If not, it is collateral.⁴ The cross-examination may go far enough, not only to overthrow the direct evidence of the witness, but also to rebut inferences.⁵

§ 91. Same subject—Collateral matters affecting standing of witness.—While there is a class of crimes the commission of which absolutely disqualifies a person as a witness, by rendering him infamous, yet the court may, as a matter of discretion, permit a witness to be otherwise discredited by an inquiry on cross-examination as to specific collateral matters,

¹ *Amos v. State*, 96 Ala. 120, 11 So. Rep. 424; 1 Greenl. on Ev., § 449.

² *Lee v. State*, 21 Ohio St. 151; *State v. Kent*, (S. Dak.) 62 N. W. Rep. 631.

³ It is within the discretion of the trial court to permit a cross-examination to extend to an inquiry as to the antecedents of a witness. *Besselte v. State*, 101 Ind. 85; *Spencer v. Robins*, 106 Ind. 580, 5 N. E. Rep. 726; *Parker v. State*, 106 Ind. 580, 35 N. E. Rep. 1105. The fact of an admission of ill-feeling or prejudice as to a party

will not prevent an inquiry on cross-examination into the exact state of the witness's feelings. *Stewart v. Kindel*, 15 Colo. 539, 25 Pac. Rep. 990, and cases cited.

⁴ *Welch v. State*, 104 Ind. 347, 3 N. E. Rep. 850; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. Rep. 911; *George v. State*, 16 Neb. 318, 20 N. W. Rep. 311.

⁵ *Hildeburn v. Curran*, 65 Pa. St. 59; *Drake v. State*, 29 Tex. App. 265, 15 S. W. Rep. 725.

acts done in secret, but the opposite conclusion must be insisted on where a witness is a party to a relationship of such a brazen character as to indicate an utter disregard for the opinion of others. Thus, it was held proper in New York to show, on the cross-examination of a defendant, who was on trial for murder, that he was living at the time of the homicide with a mistress, notwithstanding the fact that this course of examination tended incidentally to discredit the woman, who was also a witness.¹ A witness who admits his conviction of an offense can not be permitted to state that he was not guilty.² The credibility of a witness may be impeached by proof of mental defects, such as loss of memory. This may be shown on cross-examination or independently.³ If the answer to the question asked would furnish even a link in the chain of evidence which would fix upon the witness a criminal charge, or would expose him to a forfeiture of his estate, or to a penalty imposed by statute, it is his privilege, whether the matter inquired of be relevant or otherwise, to refuse to answer. So it is his privilege to refuse to answer if the question is collateral and intended only to disgrace him. In all of these cases, however, the privilege is of a personal character, and is not to be asserted for the witness by the party producing him. If the answer would tend merely to degrade the witness, or subject him to a civil liability, yet if the matter of inquiry be relevant and material to the issue, he may be compelled to answer. We have already seen that if a witness is asked a question on cross-examination concerning a purely collateral matter, the party ask-

§ 458. See *City of South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792, as to the rule where character for chastity or consent is in issue.

¹ *People v. Webster*, 139 N. Y. 73, 34 N. E. Rep. 730.

² *Com. v. Galligan*, 155 Mass. 54, 28 N. E. Rep. 1129.

³ *Alleman v. Stepp*, 52 Iowa 626, 3 N. W. Rep. 636, 35 Am. Rep. 288, and note; *Isler v. Dewey*, 75 N. Car. 466; *McDowell v. Preston*, 26 Ga. 528. See

Goodwyn v. Goodwyn, 20 Ga. 600. Some of the cases cited in this note deny the authority to introduce independent evidence to the effect merely that a witness does not possess a good memory; in other words, they confine a party seeking to overthrow the testimony of a witness on this ground to cross-examination, and only permit independent evidence on the subject where such evidence tends to show an abnormal condition of mind.

ing it is not permitted to introduce substantive evidence to contradict it. It is not, however, regarded as collateral to show prior ill-feeling, interest or other matter calculated to show the *animus* of the witness, and substantive evidence can be introduced on this subject, as it goes to the root of the question as to whether the witness's testimony is true.¹

¹ *McGinnis v. Grant*, 42 Conn. 77; *New Portland v. Kingfield*, 55 Me. 172; *Day v. Stickney*, 14 Allen 255; *People v. Webster*, 139 N. Y. 73, 34 N. E. Rep. 736; *People v. Brooks*, 131 N. Y. 321, 30 N. E. Rep. 189; *Hotchkiss v. Insurance Co.*, 5 Hun 90; *People v. Moore*, 15 Wend. 419; *Newton v. Harris*, 6 N. Y. 345; *People v. Thompson*, 41 N. Y. 1; *Schulz v. Railroad Co.*, 89 N. Y. 242; *Robinson v. Hutchinson*, 31 Vt. 443; *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424; *Cook v. Brown*, 34 N. H. 460; *McHugh v. State*, 31 Ala. 317; *Haralson v. State*, 82 Ala. 47, 2 S. Rep. 765; *State v. Roberts*, 81 N. Car. 605; *Edwards v. Sullivan*, 8 Ired. 302; *State v. McFarlain*, 41 La. Ann. 686, 6 S. Rep. 728; *Scott v. State*, 64 Ind. 400; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. Rep. 911; *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. Rep. 41; *Martin v. Barnes*, 7 Wis. 206; *Bennett v. State*, 28 Tex. App. 539, 13 S. W. Rep. 1005. There are a number of cases which hold that the fact of hostility or interest may be shown without first examining the witness whom it is sought to discredit upon the subject. *People v. Webster*, 139 N. Y. 73, 34 N. E. Rep. 730. (In this case the effort was to show the intimate social relations between the defendant and the witness); *People v. Brooks*, 131 N. Y. 321, 30 N. E. Rep. 189, and cases cited; *Haralson v. State*, 82 Ala. 47, 2 S. Rep. 765. *Contra*, *Baker v. Joseph*, 16 Cal. 173; *State v. Stewart*, 11 Ore. 52, 238, 4 Pac. Rep. 128. See cases cited in *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. Rep. 41. In answer to a question at one time submitted to the judges by the House of Lords, the Lord Chief Justice said: "The general rule, and the general practice, is this: if it is intended to bring the credit of the witness into question by proof of anything that he may have said or declared touching the cause, the witness is first asked on cross-examination whether or no he has said or declared that which is intended to be proved." 2 Phil. on Ev., (1849 ed.) 436. There is this difference between the effort to prove hostility or interest on the cross-examination, and the attempt to show such facts as a part of the case of the party offering it: That in the former case the entire facts may be inquired into, while in the latter case it is necessary to introduce direct and positive evidence on the subject, for the reason that the trial of the main issue in the case can not be suspended to prove the facts sought to be shown by circumstantial evidence. *Schultz v. Railroad Co.*, 89 N. Y. 242; *People v. Brooks*, 131 N. Y. 321, 30 N. E. Rep. 189; *State v. Bilansky*, 3 Minn. 246. In *Com. v. Hobbs*, 140 Mass. 443, 5 N. E. Rep. 158, it was held that while it was competent for the defendant to show that a witness who had testified against him had procured his arrest, yet it was not competent for the defendant, in order to prove that the bias of the witness was of a malignant character,

§ 92. **Corroboration of witness by proving his like statement out of court.**—The fact that a witness has, before testifying, made a different statement, although not upon oath, necessarily impeaches either his veracity or his memory, but the fact of his having made a statement out of court in harmony with his statement in court does not add any greater degree of probability to his statement under oath. For this reason the authorities agree that such evidence is ordinarily inadmissible, notwithstanding the fact that the witness has been contradicted.¹ There are a line of cases recognizing the admissibility of evidence of this character in cases where the witness has been sought to be impeached by proof of prior inconsistent statements made by him.² This is not the correct rule on principle, as the first proposition of this section shows. The rule has its limitations and its purposes. If a party attacks his adversary's witness, either by cross-examination or substantive evidence, in such manner as to warrant an inference that the statement of the witness is a recent fabrication, or that at the time of testifying he is under a strong bias, or in such a situation as to put him under a sort of a moral duress to testify in a particular manner, then it is competent to show that prior to the time when the existence of sinister motives could have been claimed, he made a like statement.³ In such a case the prior statement is not substan-

to further prove that the charge was false, and was known by the witness to be so when he preferred it. The court in ruling upon this point, after stating that the evidence offered would raise a collateral issue, said: "It is impracticable to carry an inquiry into the precise degree of ill-feeling or bias so far as the defendant sought."

¹ *Hodges v. Bales*, 102 Ind. 494, 1 N. E. Rep. 692; *Hobbs v. State*, 133 Ind. 404, 32 N. E. Rep. 1019. See *Crooks v. Bunn*, 136 Pa. St. 368, 20 Atl. Rep. 529.

² *Hobbs v. State*, 133 Ind. 404, 32 N.

E. Rep. 1019, and cases cited; *State v. Johnson*, 47 La. Ann. —, 17 So. Rep. 789. But even where this doctrine is recognized it is not carried so far as to admit the declarations of a party. *Logansport, etc., Turnpike Co. v. Heil*, 118 Ind. 135, 20 N. E. Rep. 703; *Mcerring v. Smith*, 7 Ind. App. 451, 34 N. E. Rep. 675.

³ *Robb v. Hackley*, 23 Wend. 50; *Conrad v. Griffey*, 11 How. (U. S.) 480; *State v. Flint*, 60 Vt. 304, 14 Atl. Rep. 178; *Com. v. Jenkins*, 10 Gray 485; *People v. Doyell*, 48 Cal. 85; *Stolp v. Blair*, 68 Ill. 541; *English v. State*, 30 Tex. Cr. App. 470, 30 S. W. Rep. 233;

tive evidence of the fact so stated, but it is evidence tending to demolish the theory of the party attacking the witness, relative to his evidence. There are a class of cases, as in prosecutions for rape, where the failure to make early complaint is itself a suspicious circumstance, and the practice has grown up of overcoming such suspicion, by offering evidence of such complaint in advance of any distinct effort to discredit the witness by proof of silence. But this subject will be considered in another connection.¹

§ 93. **Impeachment by contradictory statements.**—We have already seen that a witness can not be impeached except upon a point relevant to the issue, or upon matters affecting his bias as a witness. If the matter proposed to be proved be of an impeaching character, and not in any degree substantive, it is necessary that a foundation should first be laid by asking the witness whether he made the statement, calling his attention to the time and place where it was made.² This is necessary to quicken the recollection of the witness, and to afford him an opportunity of explanation. If the statement is in writing, and there is no proof of its loss, the party interrogating the witness must produce the writing for the inspection of the witness, excepting possibly where the impeaching statement is contained in the deposition of the witness previously taken.³

Silva v. Pickard, 10 Utah 78, 37 Pac. Rep. 86. See *Madden v. State*, 65 Fla. 176, 3 So. Rep. 328; *Fallin v. State*, 83 Ala. 5, 3 So. Rep. 525; *State v. Porter*, 74 Iowa 623, 38 N. W. Rep. 514; *Chase v. Perley*, 148 Mass. 289, 19 N. E. Rep. 398; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. Rep. 396; *Connor v. People*, 18 Colo. 373, 33 Pac. Rep. 159, 36 Am. State Rep. 295; *State v. George*, 8 Ired. L. 324, 49 Am. Dec. 392.

¹ *Post*, Chap. V.

² *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337; *State v. Hunsaker*, 16 Ore. 497, 19 Pac. Rep. 605; *McCullough v. Dobson*, 133 N. Y.

114, 30 N. E. Rep. 641. This rule is not relaxed because the evidence of the witness is in the form of a deposition, and no further opportunity exists to lay the foundation for an impeachment. *Stacy v. Graham*, 14 N. Y. 492; *Craft v. Com.*, 81 Ky. 250, 50 Am. Rep. 160; *Ryan v. People*, 21 Colo. 119, 40 Pac. Rep. 775. The precise time need not be fixed, if the place is mentioned and the occurrence otherwise identified with reasonable certainty. *Pendleton v. Empire Stone Dressing Co.*, 19 N. Y. 13.

³ *Whart. on Ev.*, § 557, and cases cited; *Pearce v. Furr*, 2 Sm. & M. (Miss.) 54; *East Tenn., etc., R. Co.*

But, even in the latter case, he should be first interrogated concerning such statement. If the two statements are consistent or reconcilable with each other, the one made out of court will not be received to impeach the witness.¹ The opinions or suspicions of a witness expressed out of court, although inconsistent with the conclusion which the facts he testified to upon the trial would warrant, can not, except where his opinion is in issue, or where proof of his former statement goes to show the bias of the witness, be made the basis of an impeachment.² It is obvious, however, that these last two propositions have to do with the right to impeach the witness; it is, of course, permissible to make use of possible contradictions and expressions of conflicting opinion on cross-examination. A witness can not escape an impeachment by the claim that he does not remember the contradictory statement.³ Cases in opposition to this statement may be found,⁴ but they are not well grounded in principle, for, although the witness whose testimony is in question may not in such a case be contradicted by the impeaching witness, yet if the statement of the latter is true, the testimony of the former stands in contradiction of his prior declaration—a method of impeachment which should ordinarily be regarded as sufficient.

v. Thompson, 94 Ala. 636, 10 So. Rep. 280. In *Queen's Case*, 2 Brod. & B. 284, it was determined: That if the writing is in existence and can be produced, it should be shown to the witness, although it is permissible to submit but a part of it to him; that if he denies its authority, its contents can not be shown by cross-examination, but only by the production of the letter, that the court may be possessed of the whole; that if the witness admits the authority of the writing its contents can still only be shown by a reading of it; that the writing should ordinarily be read as a part of the case of the cross-examining counsel, but the court may permit it to be read at once.

¹ *Wagner v. State*, 116 Ind. 181, 18 N. E. Rep. 833; *Whart. on Ev.*, § 558, and cases cited.

² *People v. Stackhouse*, 49 Mich. 76, 13 N. W. Rep. 364; *Drake v. State*, 29 Tex. 265, 15 S. W. Rep. 725; *Holmes v. Anderson*, 18 Barb. 420.

³ *Crowley v. Page*, 7 Car. & P. 789; *Chapman v. Coffin*, 14 Gray, 454; *Nute v. Nute*, 41 N. H. 60; *Gregg Township v. Jamison*, 55 Pa. St. 468; *Payne v. State*, 60 Ala. 80; *Janeway v. State*, 1 Head (Tenn.) 130; *State v. Johnson*, 47 La. Ann. —, 17 So. Rep. 789.

⁴ *Pain v. Beeston*, 1 Mo. & R. 20; *Long v. Hitchcock*, 9 Car. & P. 619; *Wiggins v. Holman*, 5 Ind. 502 (but see § 508, R. S. Ind. 1881).

§ 94. **Impeaching evidence not substantive.**—Impeaching testimony goes only to the credibility of the witness against whom it is directed; it can not be given any force as substantive evidence.¹

§ 95. **Right to impeach character of witness.**—Few rules of evidence are vindicated by more abundant authority than that which permits an impeachment of an opponent's witness by proof of his bad character. The word "character," as used in this connection, is synonymous with general reputation.² The witness or the party producing him can not be called upon to meet evidence of particular acts. "Look ye," said Lord Chief Justice Holt, "you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think that we will try, at this time, whether he be guilty of robbery."³ The authorities are in serious disagreement as to whether the evidence must be confined to general reputation for truth and veracity, or whether it may go to general moral character as well. The former view is maintained by many authorities, in which it is argued that a person may have all of the other vices and yet be entirely truthful.⁴ The doctrine that character may be impeached by proof of general immorality is also well maintained.⁵ The argument in favor

¹ Winchester, etc., Manufacturing Co. v. Cleary, 116 U. S. 161, 6 Sup. Ct. Rep. 369; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. Rep. 570, 38 Am. St. Rep. 30; Seller v. Jenkins, 97 Ind. 430; Ohio, etc., R. Co. v. Stein, 140 Ind. 61, 31 N. E. Rep. 180; Hicks v. Stone, 13 Minn. 434; Heddles v. Chicago, etc., R. Co., 74 Wis. 239, 42 N. W. Rep. 237, 20 Am. St. Rep. 106; Josephi v. Furnish, 27 Ore. 260, 41 Pac. Rep. 424.

² Knode v. Williamson, 17 Wall. (U. S.) 586; Kimmel v. Kimmel, 3 Serg. & R. 336, 8 Am. Dec. 665. See State v. Egan, 59 Iowa 636, 13 N. W. Rep. 730.

³ 4 St. Tr. 693, 13 Howell's St. Tr. 211.

⁴ Tesse v. Huntingdon, 23 How. 2; United States v. Vansickle, 2 McLean 219; State v. Bruce, 24 Me. 71; State v. Howard, 9 N. H. 486; Spears v. Forrest, 15 Vt. 435; Com. v. Moore, 3 Pick. 194; Humphrey v. Humphrey, 7 Conn. 116; Gough v. St. John, 16 Wend. 645; Crose v. Rutledge, 81 Ill. 266; People v. Yslas, 27 Cal. 630; State v. Egan, 59 Iowa 636, 13 N. W. Rep. 730; Heath v. Scott, 65 Cal. 548, 4 Pac. Rep. 557. See Gilchrist v. McKee, 4 Watts 380, 28 Am. Dec. 721; Quinsigamond Bank v. Hobbs, 11 Gray 250.

⁵ Gilliam v. State, 1 Head (Tenn.) 38, 73 Am. Dec. 161; Peck v. State, 86 Tenn. 259, 6 S. W. Rep. 389; Tackett v. May, 3 Dana (Ky.) 80; Lockard v. Com.,

of the latter view finds forcible expression in a Texas case,¹ in which it is said: "The proposition announced in *Boon v. Weathered*,² that one of vicious character 'may still preserve the priceless virtue of truth, though every other virtue is gone,' is not the teaching of human experience. Such a case would be deemed an exception so marked as should require the fact to be affirmatively shown. Among the dissolute and degraded we do not naturally seek or expect to find this best characteristic of manhood. Without proof to the contrary, the jury may fairly assume that from the immoral and criminal character truth has fled with other virtues."³ But, however this may be, it is entirely settled that the law rejects even general reputation of a particular immorality, unless that immorality be untruthfulness. Thus, in the case of a female witness, it is not competent to introduce evidence of her general reputation for chastity, where the question of her possession of that virtue is not in some way, either directly or indirectly, involved,⁴ as might be possible in a suit for defamation, or seduction, or in a prosecution for rape, as bearing on the question of the woman's consent. The question as to the reputation of the witness, being designed to impeach his evidence, should, according to many authorities, relate to the time at which he testifies.⁵ The better view, however, is that, as proof

87 Ky. 201, 8 S. W. Rep. 266; *State v. Shields*, 13 Mo. 236, 53 Am. Dec. 147; *State v. Rider*, 95 Mo. 474, 8 S. W. Rep. 723; *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. Rep. 142; 24 Am. St. Rep. 748; *Yarbrough v. State*, 105 Ala. 43, 16 So. Rep. 758.

¹ *Carroll v. State*, 32 Tex. App. 431, 24 S. W. Rep. 100, 40 Am. St. Rep. 786.

² *Boon v. Weathered*, 23 Tex. 675, 684, 688.

³ *Bean v. State*, 14 Tex. App. 35, 5 S. W. Rep. 523.

⁴ *Com. v. Churchill*, 11 Met. (Mass.) 588, 45 Am. Dec. 229 (*Com. v. Murphy*, 14 Mass. 387, overruled); *Tesse v. Hunt-*

ingdon, 23 How. 2; *Bakeman v. Rose*, 18 Wend. 146; *Gilchrist v. McKee*, 4 Watts 380, 28 Am. Dec. 721; *Spear v. Forest*, 15 Vt. 435; *People v. Mills*, 94 Mich. 630, 54 N. W. Rep. 488; *People v. Abbott*, 97 Mich. 484, 56 N. W. Rep. 862, 37 Am. St. Rep. 360; *Kilburn v. Mullen*, 22 Iowa 498; *State v. Larkin*, 11 Nev. 314; *Cline v. State*, 51 Ark. 140, 10 S. W. Rep. 225; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Smith v. State*, 58 Miss. 867.

⁵ *Webber v. Hanke*, 4 Mich. 198; *State v. Potts*, 78 Iowa 656, 43 N. W. Rep. 534; *Rawles v. State*, 56 Ind. 433; *Mitchell v. Com.*, 78 Ky. 219, 39 Am. Rep. 227.

of reputation at a time near the date of the trial may justify a presumption of its continuance, the court may exercise a measure of discretion as to the receiving of evidence of prior reputation.¹ Probably no dissent will be found from the proposition that, where a witness has not lived sufficiently long in his place of residence, at the time of the trial, to have acquired a reputation at such place, it is competent to show his reputation at the last place where he had remained long enough to have acquired a reputation.² If there is evidence that the general reputation of a witness for truth and veracity at the time of the trial is bad, then it is competent to go back of that time and fortify the prior evidence by proof that such reputation at a considerable time before had also been bad.³ In a

¹ See *Pape v. Wright*, 116 Ind. 502, 19 N. E. Rep. 459; *Tesse v. Huntingdon*, 23 How. (U. S.) 2; *Sleeper v. Van Middlesworth*, 4 Denio 431; *Rathbun v. Ross*, 46 Barb. 127; *Snow v. Grace*, 29 Ark. 131. In *Com. v. Billings*, 97 Mass. 405, it was held competent to show the general reputation of a witness eighteen months before the time of trial. In *Mynatt v. Hudson*, 66 Tex. 66, 17 S. W. Rep. 396, it was held that it was proper to prove the bad general reputation of a witness at another place, where he had resided until four years before the trial. The court said: "The law does not presume that a person of mature age, whose reputation has been notoriously bad to within a period such as intervened between the time the appellant resided in Johnson county and the time when the witness testified, has so reformed as to acquire a different reputation."

² In *Pape v. Wright*, 116 Ind. 502, 19 N. E. Rep. 459, it was held, where a witness had moved from Ft. Wayne to New York City, September 25, 1885, and his deposition had been taken in the following November,

that it was competent to impeach his general reputation at Ft. Wayne. In *Sun Fire Office v. Ayerts*, 37 Neb. 184, 55 N. W. Rep. 635, the facts were that a witness had lived one and one-half years in Omaha, where the trial was had, and that he had not lived at Sioux Falls for two and one-half years. Held, that it was incompetent to show his reputation at the latter place. In *State v. Taylor*, 45 La. Ann. 605, 12 So. Rep. 927, it was held that the reputation of a witness at a home which he had occupied some five years before the trial could not be shown.

³ In *People v. Abbot*, 19 Wend. 192, the court said: "The character of the prosecutrix for truth and veracity had already been slightly impeached, when it was proposed to follow that up by showing that it was also bad several years ago. The inquiry is not in its nature limited as to time. The character of the habitual liar or perjurer seven years since would go at least to fortify the testimony which should now fix the same character to the same person. Witnesses must speak on this subject in

competent to treat him as any other witness for the purposes of impeachment.¹

§ 96. **Corroboration of witness.**—The fact that there is a contradiction among the witnesses will not authorize proof of good character to sustain the testimony of one of them.² Professor Greenleaf states that “where evidence of contradictory statements by a witness, or of other particular facts, is offered by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth.”³ The authorities agree that where the opposite party assails the general character of a witness for truth and veracity it is competent to support him by evidence of general reputation. The point of divergence among the cases is as to what amounts to a putting of the character of the witness in issue. Accordingly, many authorities hold, with Professor Greenleaf, that proof by other witnesses of the contradictory statements of a witness will authorize the introduction of evidence as to his character.⁴ Other authorities deny this proposition.⁵ There is a middle line of cases in which it is held that where the witness is subjected to

Rep. 738. *Contra*, Phillips v. Kingsfield, 19 Me. 375, 36 Am. Dec. 760. It is improper to ask a witness if his testimony was not impeached at another trial. *People v. Cahoon*, 88 Mich. 456, 50 N. W. Rep. 384; *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. Rep. 439.

¹ *Com. v. Keenan*, 97 Mass. 589; *Connors v. People*, 50 N. Y. 240; *Keyes v. State*, 122 Ind. 527, 23 N. E. Rep. 1097; *McDonald v. Com.*, 86 Ky. 10, 4 S. W. Rep. 687; *State v. Taylor*, 45 La. Ann. 605, 12 So. Rep. 927.

² *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. Rep. 697; *State v. Desforges*, 47 La. Ann. 1167; 1 Greenl. on Ev., § 469; *Russell v. Coffin*, 8 Pick. 143; *Boardman v. Woodman*, 47 N. H. 120; *Wertz v. May*, 21 Pa. St. 274.

³ 1 Greenl. on Ev., § 469.

⁴ *Sweet v. Sherman*, 21 Vt. 23; *State v. Cherry*, 63 N. Car. 493; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. Rep. 594; *Board of Com. Carroll Co. v. O'Connor*, 137 Ind. 622, 35 N. E. Rep. 1006; *Holley v. State*, 105 Ala. 100, 17 So. Rep. 102; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. Rep. 697; *Texas, etc., R. Co. v. Raney*, 86 Tex. 363, 23 S. W. Rep. 340.

⁵ *Russell v. Coffin*, 8 Pick. 143; *Brown v. Mooers*, 6 Gray 451; *Gertz v. Fitchburg, etc., R. Co.*, 137 Mass. 77, 50 Am. Rep. 285; *Stamper v. Griffin*, 12 Ga. 450, 65 Am. Dec. 628; *Wertz v. May*, 21 Pa. St. 274; *State v. Archer*, 73 Iowa 320, 35 N. W. Rep. 241; *George v. Pilcher*, 28 Grat. 299, 26 Am. Rep. 350.

a severe cross-examination, in which it is implied that the witness has been convicted of crime, or has done some other act affecting his credibility, like suborning a witness, his character is thereby put in issue, so that it may be supported.¹ The divergence among the authorities on this question will likely continue. Viewed broadly, and from the standpoint of principle, however, it would seem that Professor Greenleaf's statement is substantially correct. If there is a mere contradiction among witnesses, the consideration of time must preclude an effort to support each witness affirmatively, but if a witness has been singled out for a special assault upon his veracity or credibility, other than by a close cross-examination as to the facts in the case, and especially if what are claimed to be his contradictory statements out of court are used against his evidence, the ends of justice would seem to require that the jury should be advised as to his good character, if he enjoys one. Mr. Starkie, whose opinion upon questions of evidence is entitled to great weight, says: "A party can not bring evidence to confirm the character of a witness before the credit of that witness has been impeached, either upon cross-examination, or by the testimony of other witnesses; but if the character of a witness has been impeached, although upon cross-examination only, evidence on the other side may be given to support the character of the witness by general evidence of good conduct."² It was held in a Connecticut case,³ that it was competent to show the good character of the prosecutrix in a rape case, in the first instance, for the reason that, according to the old books, her story is strengthened, if she is of fair fame. A further, and an unjustifiable, innovation obtains in Connecticut, that, if a witness is a stranger at the place of trial, it is admissible to support

¹ *Paine v. Tilden*, 20 Vt. 554; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. Rep. 697; *Richmond v. Richmond*, 10 Yerg. 343; *Texas, etc., R. Co. v. Raney*, 86 Tex. 363; 23 S. W. Rep. 340. Where a witness has been impeached by evidence of his conviction for crime, it is competent to

corroborate him. *Webb v. State*, 29 Ohio St. 351; *Wick v. Baldwin*, 51 Ohio St. 51, 36 N. E. Rep. 671; *Gertz v. Fitchburg, etc., R. Co.*, 137 Mass. 77, 50 Am. Rep. 285.

² 1 Starkie on Ev., star p. 186.

³ *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90.

his testimony by proof of his general moral character.¹ A witness who is generally acquainted in the community where another resides may testify that he never heard the reputation of such person discussed.² "That reputation may with justice be called good, which no slanderer has ever mentioned to even so much as question. When it can be said of a man by those well acquainted with him that they never heard his reputation as to truth and morals discussed, it is equivalent to passing upon him the highest encomium."³ It is competent, on the cross-examination of a witness as to good character, to ask him as to such specific acts of the person whose character is in question as tend to contradict the testimony of the witness in chief.⁴

¹ *Merriam v. Hartford, etc., R. Co.*, 20 Conn. 354, 52 Am. Dec. 344, and see *Texas, etc., R. Co. v. Raney*, 86 Tex. 363, 23 S. W. Rep. 340.

² *Day v. Ross*, 154 Mass. 13, 27 N. E. Rep. 676.

³ *State v. Grate*, 68 Mo. 22. "To acquire a knowledge of a person's general character, it is not necessary to know all his neighbors, or to hear any one speak of his disposition to tell the truth, or his integrity drawn in question. His virtues may be universally acknowledged, and the bright spots so prominent that his reputation exhibits no dark traits. The veracity of such a man would rarely be spoken of, and if at all, in no other than terms of commendation." *Hadjo v. Gooden*, 13 Ala. 718. It is error to instruct that the testimony of a witness who never heard the reputation of another questioned is not of as much value as the testimony of a witness who testifies that he has heard such reputation discussed and questioned among his neighbors. *Conkey v. Carpenter*, (Mich.) 63 N. W. Rep. 990.

⁴ *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. Rep. 933; *Basye v. State*, 45 Neb. 261, 63 N. W. Rep. 811, and

many cases there cited; *Lowery v. State*, 98 Ala. 45, 13 So. Rep. 498; *Fox v. Com.*, (Ky.) 1 S. W. Rep. 396. *Contra*, *State v. Tippet*, (Iowa) 63 N. W. Rep. 445. In *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94, it was held competent, where a witness has testified to the good general reputation of a witness for truth and veracity, to ask the witness as to reputation if he had not heard of the person as to whose reputation he testified spoken of as a thief and a robber. The court said: "Counsel imply, if they do not assert, that there is no proper legal connection between a man's reputation for truth and veracity and his reputation for integrity or honesty; that, while he may have the reputation of being a thief and a highwayman, his reputation for truth and veracity may still be good. We are not inclined to adopt this view of the question under consideration. Truth or veracity is a trait of the man of integrity or honesty; it is never a trait of the thief or robber. The reputation for dishonesty or criminal conduct is, we think, utterly inconsistent, with a good reputation for truth and veracity. We mean, of course, such

§ 97. **Impeachment and corroboration of impeaching witnesses.**—An impeaching witness may be impeached by evidence as to his own general reputation for truth and veracity, and it is competent to sustain his reputation, when assaulted, in the same manner.¹ Indeed, there would seem to be no reason why he should not be treated as an ordinary witness.

dishonesty or criminal conduct as was imputed to Lee in the questions propounded by the state to Stapp and Wilson, and complained of by the appellant.”
¹1 Whart. on Ev., § 568.

CHAPTER III.

CONFESSIONS.

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| 99. Confessions and admissions. | 113. Statements while insane, drunk or asleep. |
| 100. To be admissible, confessions must be voluntary. | 114. Confession as to written instrument. |
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| 111. Confession in reply to questions. | |

§ 98. **Meaning of term.**—It is not every admission of fact by a defendant in a criminal case which is a confession. The term is restricted to acknowledgments of guilt, and does not extend to mere admissions of fact, which, although they may be links in the chain of evidence against the defendant, do not amount to direct or implied admissions of crime.¹ This distinction is important, because it results from it that in the case of a mere admission in a criminal case the state is relieved from many of the restrictive doctrines which obtain where confessions are sought to be introduced.

¹State v. Mims, 26 Minn. 183, 2 N. Parton, 49 Cal. 632; Mora v. People, W. Rep. 683; People v. Le Roy, 65 19 Colo. 255, 35 Pac. Rep. 179; State Cal. 613, 4 Pac. Rep. 649; People v. Carr, 53 Vt. 37.

§ 99. **Confessions and admissions.**—Disregarding for the moment the restrictions attending the reception of plenary admissions of guilt or confessions, and it may be said that the same general rules obtain concerning the admissibility of self-disserving declarations in criminal cases as in civil cases, and the reader is referred to the chapter on admissions for a discussion of many questions which can not be considered here.

§ 100. **To be admissible, confessions must be voluntary.**—A party must be allowed to “make his own calculations as to the advantages to be derived from confessing.” An undue influence may be exercised over the mind of the defendant either by threats^a or promises of leniency.

§ 101. **Persons in authority.**—In a Minnesota case,^b it is said: “It is well settled, as a general rule, to which there may be exceptions, as in the case of young persons of immature minds, that inducements of advantage or of harm presented to the mind of the accused, in order to have the effect to exclude proof of his confessions, must have come from a person in authority—as that word has come to be understood in this connection—or must have been presented under such circumstances as to be likely to lead the accused to suppose that they were made with the sanction of a person in authority.”^c

^a *State v. Smith*, 72 Miss. 420, 18 So. Rep. 482.

^b The kind of fear which will exclude a confession must be something more than the fear which is produced by the fact that the defendant is accused of crime and taken into custody. *Com. v. Preece*, 140 Mass. 276, 5 N. E. Rep. 494.

^c *State v. Holden*, 42 Minn. 350, 44 N. W. Rep. 123.

^d To the same general effect *United States v. Stone*, 8 Fed. Rep. 232; *Early v. Com.*, 86 Va. 921, 11 S. E. Rep. 795; *Furst v. State*, 31 Neb. 403, 47 N. W. Rep. 1116, and see *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. Rep.

202; *Com. v. Nott*, 135 Mass. 269; *Corley v. State*, 50 Ark. 305, 7 S. W. Rep. 255. “It is the opinion of the judges,” said Patterson, J., in *Regina v. Taylor*, 8 C. & P. 733, “that evidence of any confession is receivable, unless there has been some inducement by some person in authority.” *Regina v. Moore*, 2 Den. C. C. 522; *Joy on Confessions*, § 2, pp. 23, 33. *Contra Regina v. Dunn*, 4 C. & P. 543.

The observations of Judge Taylor, in his work on evidence (§ 876), are especially valuable upon this point. The learned author says: “Both these contradictory decisions would seem to be open to one and the same

§ 102. **As to who are persons in authority.**—"The decisions are numerous and undoubted," says Mr. Roscoe,¹ "that the prosecutor, or the person who in the ordinary course of things will become so, the constable in charge of the prisoner, and any person having judicial authority over the prisoner, are persons in authority within the meaning of the rule. The rule also extends to the master or mistress of the prisoner, but only where the offense concerns the master or mistress."² The cases establish the further proposition that threats or promises of leniency made or held out by a person to the defendant in the presence of a person in authority will operate to exclude a confession.³

objection: namely, they endeavor to define, *as strict rule of law*, what circumstances shall be deemed, in *all cases*, to have unduly influenced the mind of the prisoner in making the confession. Now, although such a rule has been laid down with reference to inducements offered by persons in authority, because, being thought to succeed in a large majority of instances, it has, for the sake of uniformity and precision, been wisely adopted as applicable to them all, yet it by no means follows that the same rule will equally apply to all promises and threats held out by private persons. These last inducements may vary in their effect to almost any conceivable extent. They will often be obviously insufficient to produce the slightest influence on even the feeblest mind; and, in such cases, the confession which follows, but which, in fact, is not consequent on them, should be admitted in evidence. On the other hand, an inducement held out by a private individual may be, and, indeed, frequently is, quite as much calculated to cause the prisoner to utter an untrue statement, as any

promise made to him by a person in authority; in these cases the confession made to such private person should be excluded. It is therefore submitted, that, without laying down any positive rule, whether of admission or rejection, the judge should determine each case on its own merits; only bearing in mind that his duty is to reject such confessions only as would seem to have been wrung from the prisoner under the supposition that it would be best for him to admit that he was guilty of an offense which he really never committed." See 3 Greenl. on Ev., § 223; *Beggarly v. State*, 8 Baxt. (Tenn.), 520.

¹ Cr. Ev. 42.

² In *Thompson's Cases*, 20 Gratt. 724, it was held that a private detective, employed to "work up the case" was not a person in authority. See *United States v. Stone*, 8 Fed. Rep. 232; *Early v. Com.*, 86 Va. 921, 11 S. E. Rep. 795.

³ *State v. Roberts*, 1 Dev. (N. Car.) 259; *Rex v. Pountey*, 7 C. & P. 302; *Regina v. Garner*, 2 C. & K. 920, 61 E. C. L. R. 920; *Regina v. Laughler*, 2 C. & K. 225.

§ 103. **Character of inducement.**—It was said by Baron Parke in *Baldry's Case*,¹ that "the rule has been extended quite too far, and justice and common sense have frequently been sacrificed at the shrine of mercy." The justice of this observation will be conceded by all who are familiar with the length that many of the decisions have gone. There are numerous cases where it is evident that the inducement offered could have had no influence whatever, but, on the other hand, if it can justly be said that the inducement *might* have influenced the mind of the defendant, then it must be excluded, because the court can not determine to what extent, if at all, the mind of the defendant was influenced. A simple caution to a defendant to tell the truth will not exclude a confession,² but if such a suggestion is coupled with an expression importing that it would be better for him to tell the truth, the confession should be excluded, as the suggestion is made that it would be to the advantage of the defendant to say something.³ Thus, where the magistrate told the prisoner that it "would be better for him to tell the truth, and have no more trouble about it," it was held that the confession was incompetent.⁴ So a confession was excluded where the prosecutor said to the prisoner: "I should be obliged to you if you would tell us what you know about it. If you will not, we, of course, can do nothing. I shall be glad if you will."⁵ A statement by a person in authority to a defendant that "as a general thing it is better for a man who is guilty to plead guilty, for he gets a lighter sentence," has been held to render a subsequent confession inadmissible.⁶ It is not necessary to exclude a confes-

¹*Baldry's Case*, 2 Denison's Cr. Kingston's Case, 4 Car. & P. 387; Cases 430. Garner's Case, 2 Car. & K. 920; Biscoe v. State, 67 Md. 6, 8 Atl. Rep. 571.

²Quoted approvingly in *Hopt v. People*, 110 U. S. 574.

³*Rex v. Court*, 7 C. & P. 486, 32 E. C. L. R. 486; *Regina v. Holmes*, 1 Car. & K. 248, 47 E. C. L. R. 248; *Baldry's Case*, 2 Den. Cr. Cas. 430; *State v. Meekins*, 41 La. Ann. 543, 6 So. Rep. 822.

⁴*Baldry's Case*, 2 Den. Cr. Cas. 430;

⁵*Biscoe v. State*, 67 Md. 6, 8 Atl. Rep. 571. See *Heldt v. State*, 20 Neb. 492, 30 N. W. Rep. 626, 57 Am. Rep. 835.

⁶*Rex v. Partridge*, 7 Car. & P. 551.

⁷*Com. v. Curtis*, 97 Mass. 574, and see *Com. v. Nott*, 135 Mass. 269; *Hopt v. Utah*, 110 U. S. 594, 4 Sup. Ct. Rep.

sion that the inducement should have been held out to the prisoner himself; if there is good reason to believe that it came to his knowledge and influenced his conduct, the case is within the principle of the rule.¹ As a summary of the doctrine as to the effect of a threat or other inducement, it may be stated, in the language of Keating, J.,² that "the real question is, whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth, from the fear of the threat or hope of profit from the promise."

§ 104. **Influence of inducement presumed to continue.**—The authorities warrant the presumption that if a defendant makes a confession, and it appears that before that time a person in authority has indulged in a threat or promise calculated to induce the defendant to confess, the burden is upon the prosecution to show that the influence of the threat or promise has ceased.³ Many of the authorities hold that in such a case the confession must be excluded, unless the evidence shows that subsequent to the threat or promise and prior to the confession the defendant was explicitly warned.⁴ In a New Jersey case,⁵ a confession was held admissible made after five months had elapsed from the time of the inducement. The court said: "Although an original confession may have been obtained by improper means, subsequent confessions of the same, or of like facts, may be admitted, if the court believes from the length of time intervening, from proper warning of the consequences of a confession, or from other circumstances, that the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled."

202; *Owen v. State*, 78 Ala. 425; 56 Am. Am. Dec. 404; *State v. Roberts*, 1 Dev. Rep. 40; *Corley v. State*, 50 Ark. 305, (N. Car.) 259; *Whaly v. State*, 11 Ga. 7 S. W. Rep. 255. 123; *Simon v. State*, 36 Miss. 636;

¹ *Taylor on Ev.*, § 885, citing *Regina v. Harding*, 1 Arm. M. & O. 340; *Rep.* 113.

Regina v. Boswell, C. & Marsh. 584. ² *East P. C.* 658; *Van Buren v.*

³ *Regina v. Reason*, 12 Cox C. C. 228. *State*, 24 Miss. 512; *Peters v. State*, 4

⁴ *Com. v. Knapp*, 10 Pick. 477, 20 Sm. & M. 31.

Am. Dec. 534; *Com. v. Taylor*, 5 Cush. ⁵ *State v. Guild*, 5 Halst. 163, 18 Am. 605; *State v. Gould*, 5 Halst. 163, 18 Dec. 404.

§ 105. **Spiritual inducement—Promise of secrecy.**—The fact that the defendant was led to make a confession by a spiritual inducement will not suffice to exclude the confession,¹ nor will it be rejected because made under a promise of secrecy.²

§ 106. **Confessions obtained by artifice or deception admissible.**—If a confession is made voluntarily, it will not suffice to exclude it that it was obtained by artifice, deception or falsehood.³ Thus, a confession was held competent which was obtained by a person who ingratiated himself into the confidence of the defendant, who was confined in jail, by procuring himself to be locked up in the jail as a prisoner.⁴

§ 107. **Confessions obtained by hope of collateral benefit.**—The fact that the defendant is induced to confess by reason of a hope of some collateral benefit will not exclude the statement. Where a defendant made a confession in order to obtain the release of his sister, who was charged with the same offense, the confession was held competent.⁵ This was the ruling in an arson case, where a detective pretended to the defendant that he was in sympathy with barn burners, and that he desired to hire some barns burned on his own account.⁶

§ 108. **Witchcraft.**—Where a witness, who was a detective, said to a defendant, who was charged with the murder of her husband: "You had better tell me all about it. I am a right good old monger doctor. I can work roots and gummer folks, and if you will tell me all about it I can give you something so you can not be caught," it was held that the defendant's

¹ Whart. Cr. Ev., § 660. It is not against public policy to permit a witness to testify to overhearing a confession made by a defendant in prayer. *Woolfolk v. State*, 85 Ga. 69, 11 S. E. Rep. 814.

² *Bex v. Thomas*, 7 C. & P. 345; *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *State v. Darnell*, 1 *Houst. C. C.* 321.

³ *People v. Barker*, 60 Mich. 277, 27

N. W. Rep. 539, 1 Am. St. Rep. 501; *Heldt v. State*, 20 Neb. 492, 30 N. W. Rep. 626; 57 Am. Rep. 835; *Shields v. State*, 104 Ala. 35, 16 So. Rep. 85.

⁴ *State v. Brooks*, 92 Mo. 542, 5 S.W. Rep. 259.

⁵ *People v. Smalling*, 94 Cal. 112, 29 Pac. Rep. 421.

⁶ *Stone v. State*, 105 Ala. 60, 17 So. Rep. 114.

confession, which was thereupon made, was admissible, as the promise to protect by witchcraft, according to the court's view, offered no temptation to an innocent person to admit that he was guilty.¹

§ 109. **Duress.**—A confession extorted by duress is inadmissible. It was held in one case that the fact that the defendant was unlawfully held in custody rendered a confession made while he was so held inadmissible,² but this may well be doubted where the imprisonment is only technically irregular.³ In an Alabama case,⁴ a confession was held incompetent where the mistress of a servant-girl fastened her in the smoke-house, by closing the door upon her, and then said: "Now I reckon you will tell me something about burning the house: I believe you know all about it."

§ 110. **Fear of violence of mob.**—Where a confession is made by a defendant while unlawfully held in the custody of a body of men whom he has reason to think will do violence to his person, his confession will be excluded.⁵ It was held, in an Indiana case,⁶ in a strongly reasoned opinion by Elliott, J., where the defendant was induced to enter a plea of guilty through fear of mob violence, on which plea he was sentenced, that he might review the proceeding by a writ of *coram nobis*.

§ 111. **Confession in reply to questions.**—The practice of interrogating prisoners has been reprobated by many of the judges.⁷ The fact that a confession is made in answer to questions is not, however, a sufficient ground for excluding the statement.⁸

¹ *State v. Harrison*, 115 N. Car. 706, citing *Young v. State*, 68 Ala. 569; 20 S. E. Rep. 175.

² *Ackroyd & Warburton's Case*, *Contra*, *Cady v. State*, 44 Miss. 332. 1 *Lewin's Cr. Cas.* 49.

³ *Thornton's Case*, 1 *Lewin's Cr. Cas.* 49; *Balbo v. People*, 80 N. Y. 484. (Cited from *Am. & Eng. Ency. of Law*, tit. *Confessions*.)

⁴ *Hoover v. State*, 81 Ala. 51, 1 So. Rep. 574.

⁵ 3 *Am. & Eng. Ency. of Law*, 470,

citing *Young v. State*, 68 Ala. 569; *Self v. State*, 6 Baxt. (Tenn.) 244.

⁶ *Sanders v. State*, 85 Ind. 318, 44 *Am. Rep.* 29.

⁷ *Roscoe's Cr. Ev.*, star p. 48.

⁸ *Rex v. Thornton*, 1 Moo. C. C. 27; *Regina v. Kerr*, 8 C. & P. 176, *per Park, J.*; *State v. Kirby*, 1 Stroh (S. Car.) 378.

There is a *dictum* of Gibson, C. J., that a confession is not admissible which was made in reply to a question which assumed the guilt of the defendant,¹ but this has been doubted.²

§ 112. **Confessions under oath or made under compulsion.**—It is said by Starkie,³ that “the prisoner is not to be examined upon oath, for this would be a species of duress, and a violation of the maxim that no one is bound to criminate himself.” The law upon this subject, where it is not regulated by statute, is in a very chaotic condition. There does not seem to be any dissent from the proposition that ordinarily, if a person is called as a witness on a charge lodged against a third person, the voluntary statements under oath of the person so called as a witness are admissible against himself.⁴ But although no charge was pending, there is authority for excluding the statement, if the witness is subsequently put on trial for the offense, and if he had reason to believe at the time he testified that suspicion had attached to him.⁵ Where a prisoner is examined before a magistrate or grand jury, and is called on to testify without being advised of his rights, his statement will be excluded.⁶ It must be said, however, in the light of best thought and of modern authority, that the old idea that the administering of an oath is a species of duress is to be treated as exploded. The functions of tribunals appointed to determine causes are

¹ *Com. v. Mosler*, 4 Pa. St. 284.

² *McClain v. Com.*, 110 Pa. St. 263, 1 Atl. Rep. 45.

³ 2 Starkie on Ev., star p. 29.

⁴ *Railroad v. Haworth*, 4 Car. & P. 254; *People v. Mitchell*, 94 Cal. 550, 29 Pac. Rep. 1106; *Newton v. State*, 21 Fla. 53. See *Jenkins v. State*, 18 So. Rep. 182, 35 Fla. 737, 48 Am. St. Rep. 727.

⁵ *Rex v. Lewis*, 6 C. & P. 161; *Rex v. Davis*, 6 C. & P. 177.

⁶ *People v. McMahon*, 15 N. Y. 384; *People v. Mondon*, 103 N. Y. 211, 8 N. E. Rep. 496, 57 Am. Rep. 709 (examine dissenting opinion in this case);

State v. Mathews, 66 N. Car. 106; *State v. Clifford*, 86 Iowa 550, 53 N. W. Rep. 299, 41 Am. St. Rep. 518; *United States v. Kirkwood*, 5 Utah 123, 13 Pac. Rep. 234. In *Wilson v. State*, 84 Ala. 426, 4 So. Rep. 383, the facts were that the defendant was a convict working in the mines; a crime having been committed, the superintendent and “task-master and mining-boss” organized a court in the jail, and proceeded to examine witnesses. The defendant, without being informed of his right to refuse to answer, was examined. It was held that the statement was involuntary.

primarily and essentially judicial and not inquisitorial,¹ and therefore, in the language of Mr. Best,² "what our law prohibits is the special interrogation of the accused—the converting him, whether willing or not, into a witness against himself; assuming his guilt before proof, and subjecting him to an interrogation on that hypothesis." In a Pennsylvania case,³ the prisoner was brought before the justice charged with homicide. The justice administered an oath to the defendant, and then said to him: "If you do not tell the truth I will commit you." In passing on the admissibility of the testimony thus elicited, Gibson, C. J., said: "The administering of an oath by the magistrate under such circumstances was a gross outrage upon the accused. Any information drawn by it, or subsequently given on its basis, is inadmissible." The Supreme Court of Alabama thus vigorously expresses itself:⁴ "The practice of interrogating the accused during the preliminary examination is unwarranted by the principles of the common law, unauthorized by statute, and contrary to the spirit of the Declaration of Rights." It is believed, however, that the American cases justify the statement that if a defendant voluntarily tenders himself as a witness, his evidence so given under oath is competent against him,⁵ and that his evidence is alike admissible where he is called on to testify before a magistrate or grand jury, if he is explicitly informed that he may refuse to answer without subjecting himself to suspicion, and that his statements, if incriminating, may be used against him.⁶ The mere fact that a de-

¹ Best on Ev., § 558; *Lyons v. People*, 137 Ill. 602, 27 N. E. Rep. 677.

² *Lyons v. People*, 137 Ill. 602, 27 N. E. Rep. 677, § 557.

³ *Com. v. Harman*, 4 Pa. St. 269.

⁴ *Kelly v. State*, 72 Ala. 244.

⁵ *Com. v. Clark*, 130 Pa. St. 641, 18 Atl. Rep. 988; *State v. Coffee*, 50 Conn. 399, 16 Atl. Rep. 151; *Teachout*

v. People, 41 N. Y. 7; *People v. McGloin*, 91 N. Y. 241.

⁶ *United States v. Kirkwood*, 5 Utah 123, 13 Pac. Rep. 234; *State v. Wisdom*, 119 Mo. 539, 24 S. W. Rep. 1047; *Lyons v. People*, 137 Ill. 602, 27 N. E. Rep. 677; *People v. Kelly*, 47 Cal. 125. See *State v. Clifford*, 86 Iowa 550, 53 N. W. Rep. 299, 41 Am. St. Rep. 518; *Farkas v. State*, 60 Miss. 847.

fendant is tied during the course of an examination in which he makes a confession does not render it incompetent.¹

§ 113. **Statements while insane, drunk or asleep.**—The fact that a defendant was drunk or insane does not, *per se*, render a confession incompetent. The weight to be given it, when made under such circumstances, is a question for the jury.² But words uttered by the defendant while he was asleep are not admissible.³

§ 114. **Confession as to written instrument.**—Upon this subject Russell says: "There does not, on principle, seem any reason why the admissions of a prisoner should not be receivable in evidence as well when they relate to the contents of a written document as when they amount to direct confessions of guilt. The rule is generally laid down in the broadest terms: *Optimus habemus testem confitentem reum*.—Everything which the prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may seem to them to deserve."⁴

§ 115. **Confession improperly obtained subsequently rendered admissible.**—If a confession is made by a defendant as to where the body of the deceased is concealed,⁵ or where the stolen property is,⁶ or if he states any other fact which necessarily leads to the discovery of evidence which proves the case,⁷

¹ *State v. Cruse*, 74 N. Car. 491; *State v. Rogers*, 112 N. Car. 874, 17 S. E. Rep. 297.

² *Com. v. Howe*, 9 Gray 110; *State v. Feltes*, 51 Iowa 495, 1 N. W. Rep. 755; *State v. Grear*, 28 Minn. 426, 41 Am. Rep. 296; *Lester v. State*, 32 Ark. 727; *White v. State*, 32 Tex. Cr. Rep. 284, 25 S. W. Rep. 784. The defendant is not entitled to an instruction that a confession made while a person is drunk is of less weight than if he was sober, as this is a question for the jury. *Finch v. State*, 81 Ala. 41, 1 So. Rep. 565.

³ *People v. Robinson*, 19 Cal. 40.

⁴ 1 Russ. on Cr. 218, n.

⁵ *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Duffy v. People*, 26 N. Y. 588; *White v. State*, 3 Heisk. 338; *Gregg v. State*, 106 Ala. 44, 17 So. Rep. 321.

⁶ *White v. State*, 3 Heisk. 338; *Belote v. State*, 36 Miss. 96, 72 Am. Dec. 163; *Yates v. State*, 47 Ark. 172; *Selvidge v. State*, 30 Tex. 60; *Banks v. State*, 84 Ala. 430, 4 So. Rep. 382.

⁷ *Reg. v. Leatham*, 8 Cox C. C. 498; *Rice v. State*, 3 Heisk. 215; *State v. Mortimer*, 20 Kan. 93; *Com. v. James*, 99 Mass. 438.

such confession is competent, even if improperly obtained, because the possession of such information by the defendant is ordinarily a strong circumstance tending to show his connection with the crime. But if the confession is otherwise incompetent, only so much thereof can be introduced as gives point to the subsequent occurrence.¹

§ 116. **Weight to be given confession.**—Many of the observations made in the discussion of the subject of admissions² are alike applicable to the question as to the weight which should be given to evidence of confessions. As self-disserving statements they may, under particular circumstances, be entitled to very great weight, but many circumstances may conspire to weaken their force,³ and their exact dynamic effect is for the

¹Gregg v. State, 106 Ala. 44, 17 So. Rep. 321; Yates v. State, 47 Ark. 172.

²Ante, § 24.

³"The evidence of such confessions is liable to a thousand abuses. They are made by persons, generally, under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To disclose the confession is odious, as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world, in chains and degradation, with spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing, a thousand plans alternating, a soul tormented with anguish, and difficulties gathering into a multitude. How easy it is for the hearer to take one word for another, or to take a word in a sense not intended by the speaker; and, for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner and action of the one who

made the confession, how almost impossible it is to make a third person understand the exact state of his mind and meaning. For these reasons, such evidence is received with great distrust, and under apprehensions of the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity or promises of favor, and of every influence, even the minutest." State v. Fields, Peck (Tenn.) 140, quoted approvingly in Heldt v. State, 20 Neb. 492, 30 N. W. Rep. 626, 57 Am. Rep. 835. "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or the tortures of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and, therefore, it is rejected." Eyre, C. B., in Warickshall's Case, 1 Leach Cr. Cas. 299.

jury. Experience has established that persons will sometimes make false self-criminating statements even where threats or promises have not induced them. This is sometimes brought about by mental aberration; sometimes by mistake of law or fact, sometimes by an overreaching motive, and sometimes by a very spirit of self-immolation. "Whilst such anomalous cases," says an early writer, "ought to render courts and juries, at all times, extremely watchful of every fact attendant on confessions of guilt, the cases should never be invoked, or so urged by the accused's counsel, as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions which the court, in the judicious exercise of its duty, shall be enabled to make. Such a use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is no less unprofessional than impolitic; and should be regarded as offensive to the intelligence both of the court and jury."¹

§ 117. **Proof of corpus delicti.**—A solemn admission of the fact of guilt, by a plea of guilty in open court, will sustain a conviction without proof of the *corpus delicti*.² As the English law is stated by Starkie,³ "a prisoner may be convicted upon his own confession, without other evidence." It is nevertheless a fact that few, if any, English cases can be found in which convictions have been upheld where there was an absence of corroborative circumstances. In the United States the doctrine is thoroughly established that an extra judicial confession will not be received as plenary evidence, and further, that there must be also proof in such cases of the *corpus delicti*.⁴

¹ 1 Hollman's Course of Legal Study, 367. pursuant to statute may be treated as plenary evidence.

² Dantz v. State, 87 Ind. 398; State v. Lamb, 28 Mo. 218; Roscoe's Cr. Ev., star p. 37. In 1 Greenl. on Ev., § 216, it is stated that a confession embodied in a preliminary examination taken in writing by a magistrate

³ Ev., vol. 2, star p. 30.

⁴ United States v. Boese, 46 Fed. Rep. 917; People v. Badgley, 16 Wend. 53; People v. Deacons, 109 N. Y. 374, 16 N. E. Rep. 676; State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312; Gray v.

§ 118. **Meaning of term *corpus delicti*—How proved.**—The term *corpus delicti* is defined in Anderson's Law Dictionary as "the essential element of an offense: the fact that the particular crime alleged has been committed."¹ Thus, as applied to a murder case, proof of the *corpus delicti* is not alone proof of the dead body, but of the body of the crime, and includes proof of death from the wound and the unlawful infliction thereof.² So, where a defendant confessed to poisoning the deceased with a certain poison, and it appeared that the symptoms of such poisoning were present, but the evidence showed that death with like symptoms might have been produced by natural causes, it was held that the confession was inadmissible.³ While the unexplained possession of stolen goods a short time after a larceny will justify a presumption that the possessor was the thief, yet such possession has no tendency to prove the *corpus delicti*.⁴ This may be proved, however, by circumstantial evidence.⁵ As observed by Best,

Com., 101 Pa. St. 380, 47 Am. Rep. 733; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *South v. People*, 98 Ill. 261; *Williams v. People*, 101 Ill. 382; *State v. Laliyer*, 4 Minn. 368; *State v. Hogard*, 12 Minn. 293; *State v. Knowles*, 48 Iowa 598; *Pitts v. State*, 43 Miss. 472; *Brown v. State*, 32 Miss. 433; *Robinson v. State*, 12 Mo. 592; *State v. Scott*, 39 Mo. 424; *Keithler v. State*, 10 Sm. & M. (Miss.) 192; *Stephen v. State*, 11 Ga. 225; *Priest v. State*, 10 Neb. 393, 6 N. W. Rep. 468; *Smith v. State*, 17 Neb. 358, 22 N. W. Rep. 780; *Yates v. State*, 47 Ark. 172; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

¹To the same effect *People v. Palmer*, 109 N. Y. 110, 16 N. E. Rep. 529, 4 Am. St. Rep. 423.

²1 Whart. Cr. L. 311.

³*Pitts v. State*, 43 Miss. 472.

⁴*Bailey v. State*, 52 Ind. 462, 21 Am. Rep. 182.

⁵*Roberts v. State*, 61 Ala. 401; *State*

v. Kellar, 28 Iowa 553; *Brown v. State*, 1 Tex. App. 154; *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530; *State v. Loveless*, 17 Nev. 424, 30 Pac. Rep. 1080; *State v. Cardelli*, 19 Nev. 319, 10 Pac. Rep. 433; *Stocking v. State*, 7 Ind. 326; *McCullough v. State*, 48 Ind. 109. In *Ruloff v. People*, 18 N. Y. 179, it is said: "The *corpus delicti* is made up of two things: First, of certain facts forming the basis of the *corpus delicti*, by which is meant the fact that a human being has been killed, and, second, the existence of criminal and human agency as the cause of the death. Upon this first branch of the case, the prisoner's counsel insists that it can only be proved by direct and positive evidence, that the government must prove the fact of death by witnesses who saw the killing, or at least the dead body must be found. It has been said by some judges that a conviction for murder ought never to be

J.,¹ "until it pleases Providence to give us means beyond those our present facilities afford of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished." But the evidence of the fact of the crime must be proved by evidence so strong and cogent as to banish every reasonable doubt.² While the fact that the crime has been committed by some one is a fact which must be established without the aid of the confession, yet it is important here to recall the distinction made in the earlier part of this chapter between confessions and admissions. The former term is only applicable to

permitted unless the killing was positively sworn to, or the dead body was found and identified. This, as a general proposition, is undoubtedly correct, but, like other general rules, has its exceptions. It may sometimes happen that the dead body can not be produced, although the proof of death is clear and satisfactory. A strong case in illustration is that of a murder at sea, when the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel. Although the body can not be found, nobody can doubt that the author of such a crime is guilty of murder. In such a case, the law permits the jury to infer that death has ensued from the facts proved, the circumstances being such as to exclude the least, if not almost every probability, that such a person could have escaped with life; and yet there is a bare possibility in such a case that the person could have escaped with life. I am of opinion that the rule, as understood in this country, does not require the fact of death to be proved by positive and direct evidence in cases where the discovery of the body after the crime is impossible. In such cases the fact may be established by circumstances, where

the evidence is so strong and intense as to produce the full certainty of death. By the proof of a fact by presumptive evidence, we are to understand the proof of facts and circumstances from which the existence of such fact may be justly inferred. The facts and circumstances to establish the death in the case of murder, in the absence of any positive evidence, must be so strong and intense as to produce the full certainty of death, or, as Mr. Wills says, 'the death may be inferred from such strong and unequivocal circumstances as render it morally certain, and leave no room for reasonable doubt.' " To the same effect, *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. Rep. 1002; *Campbell v. People*, 159 Ill. 9; 42 N. E. Rep. 123, and cases cited.

¹ *Rex v. Burdett*, 4 Barn. & Ald. 95.

² *Rex v. Burdett*, 4 Barn. & Ald. 95; *Ruloff v. People*, 18 N. Y. 179; *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. Rep. 1002; *Campbell v. People*, 159 Ill. 9, 42 N. E. Rep. 123, 50 Am. St. Rep. 134; *Smith v. Com.*, 21 Gratt. 809; *Rippee v. Miller*, 62 Am. Dec. 177, note; *State v. Williams*, 7 Jones (N. Car.) 446, 78 Am. Dec. 248, note.

direct acknowledgments of guilt. The existence of an essential fact may be shown by the non-criminative admission of the defendant. Thus, it has been held that, in a prosecution for bigamy, the fact of the prisoner's former marriage might be proved by his admission.¹

§ 119. **Practice upon receiving confession.**—It is the right of the defendant to have the whole of his confession go in evidence.² The rule in this respect does not seem to differ in principle from the rule heretofore discussed as to the right of a party to lay before the jury the whole of an admission proved against him. It will suffice, therefore, to refer to that discussion.³ It is competent for the jury to believe the self-disserving portions of the confession and reject the balance.⁴ The defendant has a right to lay before the jury the exact circumstances under which he made the confession. It was held in one case that the prisoner might show that shortly before he confessed he had been shot by a member of the sheriff's posse which had been pursuing him.⁵ The doctrine of estoppel can not be invoked to prevent the defendant from exhibiting the true facts to the jury. In an Iowa case⁶ it was held, where a county treasurer was prosecuted for embezzlement, that he was at liberty to show, notwithstanding his reports, that the money was actually embezzled prior to the period of limitation. The court said: "We know of no rule that estops a defendant in a criminal prosecution from proving the actual facts in dispute, notwithstanding any admission or confession he may have made to the contrary. Conclusive presumptions and estoppels have no place in the criminal

¹United States v. Tenney, (Ariz.) v. Clewes, 4 C. & P. 221; Brown's 11 Pac. Rep. 472; Miles v. United States, 103 U. S. 304. A confession may be received in advance of the proof of the *corpus delicti* in cases where the existence of the *corpus delicti* depends upon intent; as in a prosecution for issuing a forged instrument. People v. Swetland, 77 Mich. 53, 43 N. W. Rep. 779.

²United States v. Tenney, (Ariz.) v. Clewes, 4 C. & P. 221; Brown's 11 Pac. Rep. 472; Miles v. United States, 103 U. S. 304. A confession may be received in advance of the proof of the *corpus delicti* in cases where the existence of the *corpus delicti* depends upon intent; as in a prosecution for issuing a forged instrument. People v. Swetland, 77 Mich. 53, 43 N. W. Rep. 779.

³Ante, § 22.

⁴Rex v. Higgins, 3 C. & P. 603; Rex v. Clewes, 4 C. & P. 225, and ante.

⁵Williams v. State, 103 Ala. 33, 15 So. Rep. 662.

⁶State v. Hutchinson, 60 Iowa 478, 15 N. W. Rep. 298.

³Rex v. Jones, 2 C. & P. 629; Rex

law in establishing the body of the crime charged." In a larceny case, where the state had introduced evidence of a confession that the defendant had stolen the property and given it to his mother, it was held competent for the defendant to introduce evidence tending to show that his mother had not received the property.¹

§ 120. **Same subject—Preliminary question for court.**—The unbroken current of authority establishes the doctrine that the preliminary question as to the competency of a confession is to be determined by the court.² In Alabama it is presumed that a confession is involuntary,³ but it would seem that there should be no presumption indulged upon the subject. If a confession is offered and the defendant challenges its competency, the correct practice is for the court to hear the evidence upon the subject in the absence of the jury.⁴ It is error for the court to admit the confession, if the defendant claims that it is not competent, without hearing the evidence upon the subject⁵ and affording the defense an opportunity to cross-examine.⁶ As said in a Massachusetts case:⁷ "There may be, however, and usually are, two questions—First, the competency of the evidence; and, secondly, the weight of evidence. The former is always a question of law. The latter is always

¹ *Com. v. Howe*, 2 Allen 153.

² *State v. Gorham*, 67 Vt. 365, 31 Atl. Rep. 845; *Com. v. Piper*, 120 Mass. 185; *Com. v. Culver*, 126 Mass. 464; *Com. v. Preece*, 140 Mass. 276, 5 N. E. Rep. 494; *People v. Fox*, 121 N. Y. 449, 24 N. E. Rep. 923; *Jackson v. State*, 83 Ala. 76, 3 So. Rep. 847; *Ellis v. State*, 65 Miss. 44, 3 So. Rep. 188, 7 Am. St. Rep. 634; *Williams v. State*, (Miss.) 16 So. Rep. 296; *Lambright v. State*, 34 Fla. 564, 16 So. Rep. 582; *Biscoe v. State*, 67 Md. 6, 8 Atl. Rep. 571; *Burdge v. State*, 53 Ohio 512, 42 N. E. Rep. 594; *Lefevre v. State*, 50 Ohio 584, 35 N. E. Rep. 52; *Thompson v. Com.*, 20 Grat. 724; *Palmer v. State*, 136 Ind. 393, 36

N. E. Rep. 130; *State v. Holden*, 42 Minn. 350, 44 N. W. Rep. 123; *Corley v. State*, 50 Ark. 305, 7 S. W. Rep. 255.

³ *Amos v. State*, 83 Ala. 1, 3 So. Rep. 749, 3 Am. St. Rep. 682.

⁴ *Williams v. State*, (Miss.) 16 So. Rep. 296; *Corley v. State*, 50 Ark. 305, 7 S. W. Rep. 255; *Washington v. State*, 106 Ala. 58, 17 So. Rep. 546.

⁵ *People v. Fox*, 121 N. Y. 449, 24 N. E. Rep. 923; *Palmer v. State*, 136 Ind. 393, 37 N. E. Rep. 130; *Murray v. State*, 25 Fla. 528, 6 So. Rep. 498.

⁶ *State v. Miller*, 42 La. Ann. 1186, 8 So. Rep. 309, 21 Am. St. Rep. 418.

⁷ *Com. v. Culver*, 126 Mass. 464.

a question of fact. The prisoner has always the right to require of the judge a decision of the competency of evidence." In the determination of the question as to the competency of the evidence much latitude of discretion is vested in the trial judge, and his decision will not be overthrown except for a plain abuse of discretion.¹ If the evidence shows without dispute that a threat was made to the defendant, or that a promise of leniency was held out to him, by a person in authority, before the confession was made, the question as to its competency would then be purely one of law, and, no doubt, an appellate tribunal would feel at liberty to pass upon the question without greatly heeding the decision of the lower court, but if there is a plain conflict of evidence as to whether an inducement was held out, the trial judge may, without impropriety, and he ordinarily should, submit the question as to the weight of the confession to the jury.² If he admits it, either the state or the defendant may adduce evidence as to the circumstances under which the confession was given, and the jury may consider such circumstances.³ The jury is not in that event at liberty to determine the admissibility of the evidence, for that has been determined by the court as a matter of law, but it is for the jury to say what weight, if any, shall attach to the confession.⁴ There are authorities to the effect that the judge should exclude the confession if he has any reasonable doubt as to its competency,⁵ and that if he admits it he should direct the jury not to give it any weight unless satisfied beyond a reasonable doubt that it was voluntary.⁶ It is believed, how-

¹ *Com. v. Preece*, 140 Mass. 276, 5 N. E. Rep. 494; *State v. Holden*, 42 Minn. 350, 44 N. W. Rep. 123; *Corley v. State*, 50 Ark. 305, 7 S. W. Rep. 255.

² *Com. v. Piper*, 120 Mass. 185; *Com. v. Preece*, 140 Mass. 276, 5 N. E. Rep. 494; *Com. v. Burrough*, 162 Mass. 513, 39 N. E. Rep. 184; *Burdge v. State*, 53 Ohio 512, 42 N. E. Rep. 594; *State v. Gorham*, 67 Vt. 365, 31 Atl. Rep. 845; *People v. Robinson*, 86 Mich. 415, 49 N. W. Rep. 260.

³ *Williams v. State*, 72 Miss. 117, 16 S. Rep. 296.

⁴ *Williams v. State*, 72 Miss. 117, 16 So. Rep. 296; *Jackson v. State*, 83 Ala. 76, 3 So. Rep. 847.

⁵ *McGlothlin v. State*, 2 Cold. (Tenn.) 223; *Williams v. State*, 72 Miss. 117, 16 So. Rep. 296; *Ter. v. Underwood*, 8 Mont. 131, 19 Pac. Rep. 398; *Wilson v. State*, 84 Ala. 426, 4 So. Rep. 383.

⁶ *Com. v. Preece*, 140 Mass. 276, 5 N. E. Rep. 494; *Burdge v. State*, 53 Ohio 512, 42 N. E. Rep. 594.

ever, that these two propositions can not be given unrestricted application. No doubt, the judge should exclude the confession in cases where the evidence without conflict generates a reasonable doubt as to whether the confession was voluntary, but, where there is a conflict of evidence on that subject, a question of fact is presented which may be submitted to the jury.¹ As to the duty of the jury, it may be said that if the case is one where, after proof of the *corpus delicti*, the whole evidence against the defendant is his confession, he ought not to be convicted unless the evidence shows beyond a reasonable doubt that it was voluntary. In such a case a reasonable doubt as to whether the confession should be given weight is the equivalent of a reasonable doubt as to guilt. But in cases where there is other evidence which, if true, would work a conviction of the defendant, an instruction that the jury should disregard the confession unless satisfied beyond a reasonable doubt that it was voluntary, would be clearly wrong, for it is not the law that the doctrine of reasonable doubt is to be applied to each item of testimony. The test question in such a case is, does a reasonable doubt remain as to the guilt of the defendant after all the evidence has been introduced?

§ 121. **Confession involving co-defendant.**—The confession must go in evidence unmutilated and entire, although it may implicate a co-defendant.² In such a case the trial judge should inform the jury that the confession is not evidence against the latter.

§ 122. **Confessed accomplice failing to testify.**—“It is a rule of law that no witness shall be required to answer any question that may tend to criminate himself, yet the accomplice, when he enters the witness box with the view of escaping punishment himself by a betrayal of his co-worker in crime, yields up and leaves that privilege behind him. He contracts to make a full statement; to keep back nothing; although in doing so he may but confess his own guilt and

¹ See *Com. v. Preece*, 140 Mass. 276, ² 1 Phil. on Ev., (1849 ed.) 414.
5 N. E. Rep. 494.

infamy. If he fails to do so in full, if he knowingly keeps back any portion of the history of the crime he undertakes to narrate, he forfeits his right to pardon, and may be proceeded against and convicted upon the confession already made."¹

§ 123. **Substance sufficient.**—It is only necessary to prove the substance of a confession.²

¹ *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321. See *Neeley v. State*, 27 Tex. App. 324, 11 S. W. Rep. 376. To the same effect, *Rex v. Rudd*, 1 Cowp. 331; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534.

² *People v. Farber*, 18 How. Pr. 493.

CHAPTER IV.

CUSTOM AND USAGE.

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| § 124. Custom. | § 127. Qualities which a usage must possess. |
| 125. Usage. | 128. Custom and usage as affecting the question of negligence. |
| 126. Usage as affecting contract. | |

§ 124. **Custom.**—Anderson, in his Law Dictionary, defines the common law thus: “A collection of maxims and customs, of higher antiquity than memory or history can reach. * * * Custom handed down by tradition, use and experience.” When the fact is recalled that the common law is largely composed of customs, the mind appreciates the proposition that “custom is something which has, by its universality and antiquity, acquired the force and effect of law, in a particular place or locality.”¹ A custom which stands in opposition to the common law must antedate the period of legal memory, because it must be founded upon the presumption either that the common law never did obtain, or that the right is based on the authority of some early law-making power other than Parliament.² These customs were all local in their character, such as the customs of London, etc., and our ancestors did not, of course, bring them to America as a part of their laws.³ We have no such customs in this country. But in a more limited sense, customs may grow up, which the courts will recognize, which are not coeval with the common law, and which have not existed since a time before the time of legal memory, but these customs are to be distin-

¹ *Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. Rep. 593, 59 Am. Rep. 211. *ing Brown on Corp.*, 29; *Harland v. Cook, Freem.* 320.

² *Harris v. Carson*, 7 Leigh 632, 30

³ *Lawson's Usages and Customs*, cit- Am. Dec. 510.

guished from those above mentioned, for the reason that they do not oppose the common law, but fix the rights of parties in instances where the common law is silent. The law merchant, for instance, will import a well-recognized contract into a transaction in which a party signs his name upon the back of a promissory note. The enforcement of a contract of indorsement is based on a usage which is so general, and which has been so often proved, that the courts will judicially recognize it.¹ In this sense we have customs in America, as, for instance, the law of the road, which in this country requires meeting horses and vehicles to be kept to the right, and which in England requires them to be kept to the left.

§ 125. Usage.—“Usage is the fact; custom the law. There may be usage without custom; there can be no custom without usage to accompany or precede it. Usage consists in a repetition of acts; custom arises out of this repetition.”²

§ 126. Usage as affecting contract.—It is a well-known fact that in the making of contracts the parties often only express the leading provisions of their agreements, for the reason that they rely upon many matters being impliedly understood between them without words, because of the course of trade. It is therefore only just to look to such usage in construing a contract, at least upon points where the contract is silent. As Lord Campbell

¹ In the English note to *Wiglesworth v. Dallison*, as reported in *Smith's Lead. Cases*, is the following: “It must not be taken that when a usage has once been proved as a matter of fact, it is to be in all subsequent cases judicially noticed as a matter of law. See *Southwell v. Bowditch*, in L. R. 1 C. P. D. 374, 45 L. J. C., p. 374, 630. ‘But,’ says Lord Justice Mellish, in *Ex Parte Powell*, L. R. 1 Ch. D. 506, ‘there is no doubt that a mercantile custom may be so frequently proved in courts of common law that the courts will take judicial notice of it, and it becomes part

of the law merchant,’ and accordingly, in *Crawcour v. Salter*, L. R. 18 Ch. D. and *Ex Parte Turquand*, L. R. 14 Q. B. D. 636, 54 L. J. Q. B. 242, the C. A. took judicial notice of the custom of hotel keepers to hire furniture, so as to exclude the operation of the reputed ownership clause in the Bankruptcy Act; and see, also, the observations of Brett, L. J., in *Lohre v. Aitchison*, L. R. 3 Q. B. D. at p. 562, as to the meaning attached by often-proved custom to various clauses in a Lloyd's policy.”

² *Anderson's Law Dicty.*, tit. Usage.

said in one case, "it is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind."¹ The purpose in permitting evidence of usage being to effectuate the intent of the parties, it follows that such evidence will not be received in any case to contradict the plain words of a contract.² Resort is frequently had to custom or usage "to annex incidents;" that is, to show such things as are accessorial or incidental to the contract. As said by Lord Mansfield in one case: "The custom does not alter or contradict the agreement in the least; it only superadds a right which is consequential to the taking."³ It is even more plain that it is proper to resort to usage for the interpretation of provisions in a contract which are ambiguous.⁴ Upon the question of mercantile, technical or local usage of words the authorities do not harmonize. Upon this subject Mr. Starkie makes the following sensible observations: "The legitimate object of extrinsic evidence in such cases, as consistent with

¹ *Humphrey v. Dale*, 7 El. & Bl. 266.

² *Tilley v. County of Cook*, 103 U. S. 155; *Hostetter v. Gray*, 11 Fed. 179; *Smith v. Clews*, 114 N. Y. 190, 21 N. E. Rep. 160, 11 Am. St. Rep. 627; *Robertson v. National Steamship Co.*, 14 N. Y. Supp. 313, 34 N. E. Rep. 1053; *Lowry v. Russell*, 8 Pick. 360; *Pickering v. Weld*, 159 Mass. 522, 34 N. E. Rep. 1081; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. Rep. 802, 59 Am. Rep. 186; *George v. Bartlett*, 2 Fost. (N. H.) 496; *Turney v. Wilson*, 7 Yerg. 340, 27 Am. Dec. 515; *Van Camp Canning Co. v. Hartman*, 126 Ind. 177, 25 N. E. Rep. 901; *Scott v. Hartley*, 126 Ind. 239, 25 N. E. Rep. 826; *Seavey v. Shurick*, 110 Ind. 494, 11 N. E. Rep. 597; *Lamb v. Henderson*, 63 Mich. 302, 29 N. W. Rep. 732; *Kvammen v. Meridian Mill Co.*, 58 Wis. 399, 17 N. W. Rep. 22; *Harrell v. Zimpleman*, 66 Tex. 292; *Holloway v. McNear*, 81 Cal. 154, 22 Pac. Rep. 514; *Wiglesworth v. Dallison*, 1 Doug. 201, *Smith's Lead. Cases*. "We

are especially bound," says Nelson, C. J., in *Allen v. Dykers*, 3 Hill 593, 597, "to refuse effect to any general or particular usage when in direct contradiction to the fair and legal import of a written contract."

³ *Wiglesworth v. Dallison*, 1 Doug. 201, *Smith's Lead. Cases*; *Harris v. Carson*, 7 Leigh 632, 30 Am. Dec. 510. "Parties who contract on a subject-matter concerning which well-known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary." *Bradbury v. Butler*, 1 Colo. App. 430, 29 Pac. Rep. 463; *Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. Rep. 1; *Robinson v. United States*, 13 Wall. 363. As to the annexing of incidents, see *Andrews v. Roach*, 3 Ala. 590, 37 Am. Dec. 718; *Helme v. Phila. Life Ins. Co.*, 61 Pa. St. 107, 100 Am. Dec. 621; *Pickering v. Weld*, 159 Mass. 522, 34 N. E. Rep. 1081, and cases cited.

⁴ *Robinson v. United States*, 13 Wall. 363.

general principles, seems to be to explain terms (in order to their due application), which are not intelligible to all who may understand the language, but which nevertheless have acquired, by virtue of habit, custom and usage, a known, definite sense and meaning among a particular class of persons, which can be well ascertained by means of the extrinsic testimony of those who are conversant with the particular use of these terms. The witnesses for the purpose may be considered as the sworn interpreters of the mercantile language in which the contract is written. Beyond this, however, the *principle* does not extend; merchants are not prohibited from annexing what weight and value they place to words and tokens of their own peculiar coinage, as may best suit their own purpose, but they ought not to be permitted to alter and corrupt the sterling language of the realm. If they use plain and ordinary terms and expressions, to which a natural, unequivocal meaning belongs, which is intelligible to all, then, it seems, according to the great principles so frequently adverted to, the plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage to the contrary. It is clear, indeed, that if a contrary practice were to prevail, and be carried to its full extent, the effect would nearly be to annihilate special contracts in mercantile affairs, and to compel all persons, under all circumstances, to conform with the usage of trade; the written contract would become a dead letter; the question would not be, what is the actual contract? but, what is the usage? and the very same terms would denote different contracts as often as mercantile fashions varied. In short the *jus et norma loquendi*, in a legal sense, would become wholly dependent on the usage of trade."¹ This subject received explicit consideration in an Alabama case,² where it is said: "In mercantile contracts, as to the subject-matter of which known usage prevails, parties are found to proceed with the tacit assumption of those usages. They commonly reduce to writing

¹ 2 Starkie Ev., star p. 566; and see also, *Seccomb v. Provincial Insurance Co.*, 10 Allen 305. ² *McClure v. Cox*, 32 Ala. 617, 70 Am. Dec. 552.

the special particulars of their agreement, but omit to specify those known usages, which are included, however, as of course by natural understanding. Evidence, therefore, of such incidents is receivable. The contract, in truth, is partly expressed and in writing, partly implied or understood and unwritten. Such contracts are very commonly framed in a language peculiar to those engaged in the particular trade out of which they arise. * * * The intention of the parties, though frequently well known to themselves, would often be defeated if this language were strictly construed, according to its ordinary import in the world at large. Evidence, therefore, of mercantile custom and usage is admitted to explain it, and to arrive at its true meaning. But in these cases a restriction is established, on the principle that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the particular contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less. Neither in the construction of such contracts will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. The best test by which to determine the existence or non-existence of such repugnancy or inconsistency as will exclude the proposed evidence of the custom and usage is to inquire whether the explanation furnished by the evidence is such as, if expressed in the written contract, would make it insensible or inconsistent." A few of the authorities making an application of the doctrine of usage will be found in the note,¹ but no attempt has been made to greatly

¹In a case where a written contract made no mention of samples, and where, according to the legal effect of the contract, the buyer was not bound to inspect the property contracted for until its delivery in bulk, it was held that it was im- proper to show a usage making it the duty of the buyer to accept or reject immediately on the receipt of samples, as such a usage would tend to alter the contract. *O'Donohue et al. v. Leggett et al.*, 134 N. Y. 40, 31 N. E. Rep. 289, citing *Corn Exchange*

multiply them. The principle on which the authorities ought to rest has been already suggested, but it must be admitted, viewing the authorities upon this subject, ancient and modern, that it will be found that, so far from conforming to principle, they are for the most part a heterogeneous mass, in which principle has been wholly disregarded, or recognized only in its outlines. The early English authorities have no doubt served to carry

Bank v. Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; *Beime v. Dord*, 5 N. Y. 95; *Wescott v. Thompson*, 18 N. Y. 363; *Bradley v. Wheeler*, 44 N. Y. 495; *Barnard v. Kellogg*, 10 Wall. 383. In *Greenstine v. Borchard*, 50 Mich. 434, 15 N. W. Rep. 540, 45 Am. Rep. 51, which involved the construction of a contract to build a walnut counter, it was held that it was not competent to prove a usage to put white wood in the panels, although it was more desirable. In *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. Rep. 844, it was held that it might properly be shown that by the usage of the glass bottle trade the words, "to be taken by January 1, 1883," meant that a bill for the stock was to be sent upon the latter date, and that if the same was paid the seller was to hold the goods in store subject to the purchaser's order, for a reasonable time. *Nonatum Worsted Co. v. North Adams Mfg. Co.*, 156 Mass. 331, 31 N. E. Rep. 293, was an action for the price of woolen yarn sold by the pound. The yarn was wound on paper tubes, called "cops." The plaintiff contended that the sale was of yarn on cops, and that the cops went to make up the pound, like the bones of a chicken. It was held proper to prove a trade usage to pay for the weight of the cops, although by the contract the weight was to be "net," as the word "net" might have been used to exclude the weight of the cases, and not of the cops. Where lumber was sold by the "1,000 foot" it

was held proper to show that this meant linear measure. *Brooks v. Brooks*, 25 Pa. St. 210. In *Kendall v. Russell*, 5 Dana 501, 30 Am. Dec. 696, it was held, where the agreement was to pay so much per 1,000 for laying brick in the wall, that evidence could not be introduced of a usage not to take account of openings. To the same effect, *Sweeney v. Thomason*, 9 Lea 359, 42 Am. Rep. 676; *Jordan v. Meredith*, 3 Yeates (Pa.) 318, 2 Am. Dec. 373. But in *Ford v. Tirrell*, 9 Gray 401, 69 Am. Dec. 297, evidence was held competent as to bricklayers' method of measurement in laying an octangular wall. So, in *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, it was held proper to prove a usage for plasterers to measure the entire wall, without allowing for openings, base-boards, etc. See also, *Pittsburg v. O'Neill*, 1 Pa. St. 342. In *Lowe v. Lehman*, 15 Ohio St. 179, the action of the trial court in permitting evidence of usage as to the measurement of brick in the wall was upheld, it appearing that the contract simply called for the laying of brick by the 1,000, without any specifications as to the dimensions, angles, openings and arches in the wall. In *Smith v. Wilson*, 3 Barn. & Adol. 728, it was held proper to show that the term "thousand," as applied to rabbits, had a local meaning of 1,200 rabbits, on the ground that the word "thousand" as applied to rabbits did not necessarily denote 1,000 units.

the modern English cases further than the judges fain would go, although not without earnest remonstrance.¹ In America the English cases have afforded a colorable justification for many cases declaring a lax doctrine upon this subject, but this tendency of adjudication, relative to usage, on this side of the water has been much checked by the influence of such eminent judges as Story, Miller and Cooley.² In a ruder age, when learning was less diffused, and before the meaning of many terms in common mercantile use had not been settled judicially, there was perhaps more reason for an appeal to external aids in interpretation,³ but it is not too much to insist

¹ See opinion of Lord Denmann, C. J., in *Trueman v. Loder*, 11 Ad. & E. 589; Taylor on Ev., § 1190, citing *Hutton v. Warren*, 1 M. & W. 486; *Anderson v. Pitcher*, 2 B. & P. 168, per Lord Eldon; *Johnston v. Usborne*, 11 A. & E. 557.

² In the *Schooner Reeside*, 2 Sumn. 569, Mr. Justice Story said: "I am, myself, no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary or amend the general liabilities of parties, under the common law as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstanding and misinterpretations and abuses, to outweigh the well known and well settled principles of law. And I rejoice to find that of late years the courts of law, both in England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage

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or custom is, to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions or acts of a doubtful or equivocal character." Cited approvingly in *Lanfear v. Blossman*, 1 La. Ann. 148, 45 Am. Dec. 76. In *Partridge v. Insurance Co.*, 15 Wall. 573, it was said by Mr. Justice Miller: "The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place, has gone quite as far as sound policy can justify. It places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules established for the interests alone of the former, a power of establishing these rules as usage or custom with the force of law." For the views of Judge Cooley upon this subject, see *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, 93 Am. Dec. 184.

³ See *Seecomb v. Provincial Insurance Co.*, 10 Allen 305.

at this time that parties shall have their rights established according to the words of their contracts, where they have seemingly made provision for the particular contingency by the use of words which have a plain and general meaning. A valid usage proved is in a sense the law of the contract to which it is applied,¹ and, therefore, the importance will be appreciated of confining usage to its proper function of explaining, and annexing incidents to, the expression of the parties.

§ 127. **Qualities which a usage must possess.**—In a case where it is sought to show a usage, its admissibility must depend upon whether it is of such a character as to render it likely that the parties contracted with reference to it. To this end, the law requires that a usage shall be certain, uniform and notorious, and of sufficiently long continuance to warrant a presumption of knowledge.² It is also required that a usage shall not conflict with public policy or the law of the land, and that it shall be reasonable and not productive of injustice in its practical operation.³ To create a presumption of knowl-

¹ See cases cited Lawson on Usages and Customs, p. 22, *et seq.*

² *Eager v. Atlas Insurance Co.*, 14 Pick. 141, 25 Am. Dec. 363; *Potts v. Aechternacht*, 93 Pa. St. 138; *Ambler v. Phillips*, 132 Pa. St. 167, 19 Atl. Rep. 71; *Lamb v. Henderson*, 63 Mich. 302, 29 N. W. Rep. 732; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. Rep. 802, 59 Am. Rep. 186; *Bissell v. Ryan*, 23 Ill. 517; *Nippolt v. Fireman's Ins. Co.*, 57 Minn. 275, 59 N. W. Rep. 191. To establish a usage "there needs not either the antiquity, the uniformity, or the notoriety of custom which in respect of all these become a local law. The usage may still be in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient

tacitly imported by the parties into their contract." *Juggomohun Ghose v. Manickchund*, 7 Moo. India App. 263, 282.

³ *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. Rep. 802, 59 Am. Rep. 186; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *East Tennessee, etc., R. Co. v. Johnson*, 75 Ala. 596, 51 Am. Rep. 489; *Anderson v. Whitaker*, 97 Ala. 690, 11 So. Rep. 919; *Tilley v. County of Cook*, 103 U. S. 155; *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, 25 N. E. Rep. 901; *Walker v. Transportation Co.*, 3 Wall. 150; *Holmes v. Johnson*, 42 Pa. St. 159; *Snowden v. Warder*, 3 Rawle 101; *Bowen v. Stoddard*, 10 Metc. (Mass.) 371; *Lucke v. Yoakum*, 25 Neb. 427, 41 N. W. Rep. 255; *Dunham v. Dey*, 13 Johns. 40; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333. The doctrine concerning usages relates to contractual, and not to statutory, obligations.

edge, the usage must be general; that is, it can not be proved by isolated instances,¹ but it may be confined to a comparatively small locality, as a city.² The only basis upon which evidence of usage is admissible is the presumption of knowledge of it upon the part of the contracting parties;³ and if this presumption is successfully rebutted, the force of the evidence of usage is wholly lost.⁴ If a person deals in a particular market, the presumption is that he deals in accordance with the established usages of that market.⁵ It has been laid down that, if a person employs an agent at another place, the principal may become bound by a usage at that place, although he had no personal knowledge of the usage;⁶ the theory being that he impliedly authorized his agent to enter into contracts which were to be construed, where necessary, with reference to existing usages at the place where the contracts were to be made.⁷ A mere private usage, if it amount to a uniform manner of doing business, may become binding, by a presumption of assent, if it appears that the other party knew of it.⁸

Osborne v. Nelson Lumber Co., 33 Minn. 285, 22 N. W. Rep. 540; *Barnes v. Bakersfield*, 57 Vt. 375; *Albright v. County of Bedford*, 106 Pa. St. 582; *Dunham v. Dey*, 13 Johns. 40; *Hatcher v. Comer*, 73 Ga. 418. But the received interpretation, or practical construction, which a statute has received, will be considered by the courts in case of doubt. *Board of Commissioners Franklin Co. v. Bunting*, 111 Ind. 143, 12 N. E. Rep. 151.

¹ *Ambler v. Phillips*, 132 Pa. St. 167, 19 Atl. Rep. 71; *Bradford v. The Homestead Fire Ins. Co.*, 54 Iowa 598, 7 N. W. Rep. 48. It is not indispensable to the validity of a custom that it shall be universally acquiesced in; for this would be to annul all customs as to those who are unwilling to abide by them. * * * It is enough if a custom be general and uniform." *Desha v. Holland*, 12 Ala. 513, 46 Am. Dec. 261.

² *Robertson v. National Steamship Co.*, 139 N. Y. 416, 34 N. E. Rep. 1053; *Wilcox v. Wood*, 9 Wend. 346.

³ *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141, 25 Am. Dec. 363; *Nippolt v. Fireman's Ins. Co.*, 57 Minn. 275, 59 N. W. Rep. 191; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374.

⁴ *Lawson on Usages and Customs*, § 19.

⁵ *Robertson v. National Steamship Co.*, 139 N. Y. 416, 34 N. E. Rep. 1053; *Bayliffe v. Butterworth*, 1 Exch. 425.

⁶ *Sutton v. Tatham*, 10 A. & E. 27; *Bailey v. Bensley*, 87 Ill. 556; *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. Rep. 641.

⁷ See *Lawson on Usages and Customs*, p. 48.

⁸ *Planters' Bank v. Markham*, 5 How. (Miss.) 397, 37 Am. Dec. 162; *Lawson on Usages and Customs*, p. 53.

A party who offers evidence of a usage must show that he contracted with reference to it.¹ Evidence of a party's own usage or habit of business is competent, as against a party familiar with it, for the purpose of explaining an engagement, entered into with such usage in view.²

§ 128. **Custom and usage as affecting the question of negligence.**—In the majority of negligence cases the question of negligence is of such a character that it must be presumed that the jurors, representing men taken from the various walks of life, are competent to decide the question, upon ascertaining the immediate facts, and upon being advised of the law. In such cases there is no occasion to appeal to the habits or customs of others to aid the jury.³ But in cases where the ques-

¹ Lawson on Usages and Customs, p. 38.

² Pittsburg, etc., R. Co. v. Nash, 43 Ind. 423; Chicago, etc., R. Co. v. Dickson, 143 Ill. 368, 32 N. E. Rep. 380.

³ Bassett v. Shares, 63 Conn. 39, 27 Atl. Rep. 421; Ilwaco R. & Nav. Co. v. Hedrick, 1 Wash. 446, 25 Pac. Rep. 335, 22 Am. St. Rep. 169; Glass v. Memphis, etc., R. Co., 94 Ala. 581, 10 So. Rep. 215; Chicago, etc., R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. Rep. 688; Southern Kansas, etc., R. Co. v. Robbins, 43 Kan. 145, 23 Pac. Rep. 113, and cases there cited. In Colf v. Chicago, etc., R. Co., 87 Wis. 273, 58 N. W. Rep. 408, where the plaintiff, a switchman, had been injured by tripping over a stub-switch, while attempting to alight from a moving train, it was held that evidence of the practice of other men in the yard to get on and off engines while moving was incompetent. "The necessary effect of such testimony," the court said, "would be to cause the jury to believe that, if others jumped from engines, it was not negligence for plaintiff to do so." In Louisville, etc., R. Co. v. Wright, 115

Ind. 378, 16 N. E. Rep. 145, 7 Am. St. Rep. 432, it was held that an offer to prove that there are bridges on all the railways in the United States which are too low for a brakeman to pass under in safety, while standing or walking on the cars, was properly rejected. In Lake Erie and Western R. Co. v. Mugg, 132 Ind. 168, 31 N. E. Rep. 564, it was held that the defendant company could not prove that other railroad companies put slivered and worn-out rails in side-tracks. But see, Doyle v. Railroad Co., 42 Minn. 79, 43 N. W. Rep. 787. In O'Connor v. Andrews, 81 Tex. 28, 16 S. W. Rep. 628, proof was held properly rejected "that this house was built like the generality of houses at the time of its construction, and that it was not the custom in this city to tie back fire walls at that time." In Larson v. Ring, 43 Minn. 88, 44 N. W. Rep. 1078, the fact was that the plaintiff was injured by coming in contact with a guy used to support a derrick. Held, error to permit defendant to prove the height at which it was usual for contractors to stretch or suspend guys. In Allen v. Burlington, etc., R. Co., 64 Iowa 94.

tion involved is of such a character that the jury will be aided by being advised of the practices of others under like circumstances such evidence is competent,¹ at least where

19 N. W. Rep. 870, it appeared that the plaintiff, a brakeman, had been struck by a cattle-chute, while hanging onto the side of a car. The defendant asked an instruction, which stated that if the chute was constructed "at the usual distance from the track at which they are usually located on well regulated railroads generally," the defendant was not guilty of negligence. Upon this point the court said: "The usual custom or practice of railroad corporations in operating their roads, constructing their machinery and buildings, can not be the ground of relief from liability for injuries sustained, if the custom or practice disregards the safety of the employe as required by law."

¹ In *Maxwell v. Eason*, 1 Stew. (Ala.) 514, the defendant was charged with negligence in directing a lamp to be carried into a gin-house, whereby the plaintiff's cotton, which was there stored, was destroyed by fire. In holding evidence competent, of the general custom of persons working about gin-houses to carry lamps into them, when stored with cotton, Safford, J., said: "The necessary and usual custom for the security of gin-houses, and how far it is prudent to risk fire in or near them, is not presumed to be equally known to all persons. If it were so to be regarded, the evidence was inadmissible. But it is presumed that prudent gin-holders have something like a uniform practice in this respect. If so, every one who sends his cotton to a gin is entitled to expect the same care and prudence for the security of his property. Then to enable the jury to decide whether this defendant used that degree of care which is

usual with a majority of prudent men in the same business or trade, evidence of the custom of such persons generally was relevant and admissible, and should have been permitted to go to the jury." In *Flanders v. Chicago, etc., R. Co.*, 51 Minn. 193, 53 N. W. Rep. 544, it was held that proof by the plaintiff of the general custom of brakemen to pass up and down the sides of cars and to jump off of them while in motion was competent, as bearing on the question of contributory negligence; "not that a negligent act will be excused because it is customary, but proof of custom is evidence, although not conclusive, as to whether the act is negligent." To the same effect, *Whitsett v. Chicago, etc., R. Co.*, 67 Iowa 150, 25 N. W. Rep. 104. Where a defendant railway company had taken partially worn rails out of its main track, and put them in a siding, and it was claimed that they were defective and had caused the plaintiff's injury, it was held that the defendant was entitled to show a general and universal custom of railroads in the northwest to so use their partially worn rails. The court said that the evidence was competent to rebut an inference of negligence arising from the fact that the rails were old. *Doyle v. St. Paul, etc., R. Co.*, 42 Minn. 79, 43 N. W. Rep. 787. Where a railway company was charged with negligence in the manner in which it attempted to restore a highway, evidence was held competent as to the way planks are generally laid at the crossing of a railroad and highway. *Kelly v. Railroad Co.*, 28 Minn. 98, 9 N. W. Rep. 588. Where the plaintiff alleged in his declaration "that the car was

the custom is a general or universal one. The very fact that it is general or universal tends strongly to show its reasonableness.¹ Judge Story, in his work on bailments, § 11, says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law, and in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age; so that, although it may not be possible to lay down any very exact rule applicable to all times and circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live. It will thence follow that in different times and in different countries the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle; so that it may happen that the same acts which in one country or

so defectively constructed in its trucks and running gear that it would not turn a curve," it was held that evidence that the same kind of trucks were used on many of the leading railways of the country, constituted an affirmative showing in favor of that make of car, and tended to overcome any presumption of negligence from the fact of the accident. *O'Connor v. Illinois, etc., R. Co.*, 83 Iowa 105, 48 N. W. Rep. 1002. "Where the better or safer course is one of doubt or uncertainty, the experience of others may be valuable in avoiding mistakes of negligence. In all affairs of life we are taught by experience, and the wise man will adopt the experience of others." *Austin v. Chicago, etc., R. Co.*, — Iowa —, 61 N. W. Rep. 849, and cases there cited. In *Daley v. American Printing Co.*, 152 Mass. 581, 26 N. E. Rep. 135, the facts were that plaintiff was injured by a set screw on a shaft, while trying to adjust a belt. Held, that the evidence of an old em-

ploye as to the manner in which he put on the belt was competent for plaintiff, as tending to show that he conducted himself in the usual and ordinary way in which similar acts were done by persons engaged in the like employment. In *Seeley v. Town of Litchfield*, 49 Conn. 134, 44 Am. Rep. 213, the court said: "Where the people in the rural districts have by immemorial custom assembled to clear the highways of snow, such fact is to be considered in determining whether the select men have been guilty of negligence in omitting to tear down a snow drift in the road." In *Veginan v. Morse*, 160 Mass. 143, 35 N. E. Rep. 451, it was held that evidence that another shop had a particular safety appliance was competent, where it became important to prove the practicability of the use of such an appliance.

¹ *Cox v. Charleston F. & M. Ins. Co.*, 3 Rich. L. (S. Car.) 331, 45 Am. Dec. 771, and cases cited in preceding note.

one age may be deemed negligent acts, may at another time or in another country be justly deemed an exercise of ordinary diligence. It is important to attend to this consideration, not only to deduce the implied obligations of a bailee, but also to possess ourselves of the true measure by which to fix the general rule. Thus, in times of primitive or pastoral simplicity, when it is customary to leave flocks to roam at large by night, it would not be a want of ordinary diligence to allow a neighbor's flock, which is deposited with us, to roam in the same manner, but if the general custom were to pen such flocks at night in a fold, it would doubtless be a want of such diligence not to do the same with them. In many parts of America, especially in the interior, where there are, comparatively speaking, few temptations to theft, it is usual to leave barns, in which horses and cattle are kept, without being under lock by night. But in our cities, where the danger is much greater and the temptation more pressing, it would be deemed a great want of caution to act in the same manner. If robbers were known to infest a particular district of country, much more precaution would be there required than in districts where robberies were of very rare occurrences. What, then, is usually done by prudent men in a particular country in respect to things of a like nature, whether it be more or less in point of diligence than what is exacted in another country, becomes in fact the general measure of diligence." These observations are quoted because of their helpfulness in the consideration of the admissibility of evidence of custom, as affecting negligence, in cases where the jury may be presumed not to be fully informed as to the extent of danger, but it is to be recollected that Judge Story's remarks had particular reference to bailments, a class of cases in which the *quantum* of care is a matter of implied contract.

CHAPTER V.

DECLARATIONS.

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| § 129. Scope of discussion. | § 150. <i>Alitunde</i> proof of age not necessary. |
| 130. Matters of public or general interest. | 151. Not necessary to prove possession under instrument. |
| 131. Either reputation or particular statements may be proved. | 152. Document a little more than thirty years old merely presumed to be genuine. |
| 132. Rights must be ancient—Death of declarants. | 153. Rule where document very ancient. |
| 133. Declarations must have been made <i>ante litem motam</i> . | 154. Declarations of persons deceased. |
| 134. Declarations of persons <i>in pari jure</i> . | 155. Must be against pecuniary interest. |
| 135. Proof of exercise of right. | 156. Need not be connected with principal act. |
| 136. Evidence admissible to defeat public right. | 157. Peculiar knowledge of declarant. |
| 137. Verdicts, judgments, etc., as evidence of ancient rights. | 158. Some phases of subject discussed in connection with next topic. |
| 138. Historical facts. | 159. Declarations by deceased persons in ordinary course of business. |
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| 141. Relationship. | 162. Business entries by deceased persons may prove facts in collateral controversies. |
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| 143. What is meant by pedigree. | 164. Evidence <i>alitunde</i> position of declarant. |
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- § 167. Must be *ante litem motam* and declarant disinterested in collateral controversy.
- 168. When entry must be made.
- 169. Such declarations may be oral.
- 170. Declarations of deceased officials.
- 171. Declarations of deceased persons as to boundaries.
- 172. Indorsements of payments—Do they toll the statute of limitations?
- 173. Leading case upon shop-books.
- 174. Shop-books in United States.
- 175. Character of transactions upon which books may be introduced.
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- 178. To what subject entry must relate.
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- 180. Character of entry.
- 181. Question of necessity as affecting right to introduce books.
- 182. Party's own entries may be shown.
- 183. Suppletory oath.
- 184. Secondary evidence of books.
- 185. Books of deceased persons.
- 186. Mere memoranda not evidence.
- 187. Bills to perpetuate testimony.
- 188. Testimony on former trial, when admissible.
- 189. Admissibility in criminal case of testimony given on former trial.
- 190. Practice as to receiving former testimony.
- 191. Complaint of woman in case of rape.

§ 129. **Scope of discussion.**—Attention will now be directed to some of the branches of derivative, or second-hand, evidence. The rule that requires that facts shall be proved by the best evidence is a practical rule, and, while it does not yield to every case of hardship because of an inability to procure better evidence, yet there are certain circumstances in which the difficulty or impracticability of procuring primary evidence is so constant that certain well defined exceptions to the rule have grown up. The first of these exceptions which will engage our attention relates to—

§ 130. **Matters of public or general interest.**—Reputation is evidence of matters of public or general interest, within the limitations hereinafter mentioned. The matter of inquiry may refer to the rights of the state as a whole, or it may refer to the rights of some minor governmental subdivision. The purpose of the requirement that such matter shall be one of public or general interest is that there may be reasonable assurance, in accepting the reputation established by the

statements of the inhabitants of the locality, that such persons were at the time informed as to the facts concerning such matter.¹ In England this exception to the rule excluding hearsay occupies a prominent place in the law. This is due to the fact that public or general rights in that country are ordinarily of greater antiquity than with us, to the fact that in this country such matters are more likely to be established by record, and to the further fact that under the feudal system a very considerable number of rights were enjoyed by the feudal tenants in common. The doctrine is most frequently invoked in this country to establish public boundaries or the public character of ways.

§ 131. **Either reputation or particular statements may be proved.**—The text-books ordinarily speak of proof of common reputation as the class of evidence which is admissible to establish matters of public or general right, but it is well established that the particular declarations of deceased persons are admissible to this end.² The receiving of such declarations finds analogy in the reception of evidence of ancient deeds, maps, leases, licenses, etc., containing declarations of public or general matters.³

¹ See as to boundaries *Boardman v. Reed*, 6 Pet. (U. S.) 828; *Conn. v. Penn.*, 1 Pet. C. C. 496; *Drury v. Midland R. Co.*, 127 Mass. 571; *Smith v. Forrest*, 49 N. H. 230; *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. Rep. 886, 60 Am. Rep. 337; *Buchanan v. Moore*, 10 S. & R. 275; *Shook v. Pate*, 50 Ala. 91; *Murray v. Spencer*, 88 N. Car. 357; *Cline's Heirs v. Catron*, 22 Gratt. 378; *Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704; *Taylor v. Shufford*, 4 Hawks (N. Car.) 116, 15 Am. Dec. 542; *Stetson v. Freeman*, 35 Kan. 523; *People v. Velarde*, 59 Cal. 457; *Cox v. State*, 41 Tex. 1.

² Nor is it essential to the admissibility of such declarations that the

witness testifying to them should be able to state the names of the persons who made the declarations. Such a doctrine would, in a large measure, break down the exception. *Moseley v. Davies*, 11 Price 162.

³ *Barnes v. Mawson*, 1 M. & S. 77; *Brett v. Beales*, 1 M. & M. 416; *Freeman v. Phillips*, 4 M. & S. 486; *Curzon v. Lomax*, 5 Esp. 60; *Plaxton v. Dare*, 10 Barn. & C. 17; *Weld v. Brook*, 152 Mass. 297, 25 N. E. Rep. 719. See *Clarkson v. Woodhouse*, 5 T. R. 412, n. To justify the introduction of an ancient map it should appear that it was made by a person having an adequate knowledge or that it is a public document.

§ 132. **Rights must be ancient—Death of declarants.**—The foundation principle of the admission of hearsay evidence in this class of cases is the presumption that under the circumstances better evidence could not be obtained. Consequently, the right must be of some antiquity. Just what limits should be fixed with reference to this depends upon whether the evidence tendered is that of the declaration of a particular person or of reputation. In a Massachusetts case,¹ where a controversy existed as to whether a strip of land was a highway, it was held competent, as a matter of public and general interest, to introduce a deed executed in the year 1862, by a grantor, who had subsequently died, in which he made reference to such strip as a highway, in bounding his land. It is obvious, however, if an appeal is made to common reputation, that in the nature of things the right must be more antiquated, in order to avoid the objection that there may be living witnesses. In such a case it may well be said with Professor Greenleaf:² "It is to be observed that the exception we are now considering is admitted only in the case of ancient rights, and in respect to the declarations of persons supposed to be dead."³

§ 133. **Declarations must have been made ante litem motam.**—We have already noted that the law in admitting hearsay evidence of ancient public or general rights, and thus abrogating the necessity of an examination and an oath, has so hedged the doctrine about as to exclude, as far as possible, the declarations of persons who were unfamiliar with the right. The declarants are treated as witnesses present in court, and it is only the declarations of these who would have been witnesses competent to testify on the subject that are admitted.

¹ *Weld v. Brook*, 152 Mass. 297, 25 N. E. Rep. 719. (S. Car.) 258. It is not enough that the person be beyond the process of the court. *Gervin v. Meredith*, 2 N.

² 1 Vol. on Ev., § 130.

³ See *Rex v. Millington*, 1 Car. & K. 58; *Moseley v. Davies*, 11 Price 162; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334; *Higley v. Bidwell*, 9 Conn. 447; *Blythe v. Sutherland*, 3 M'Cord (1849 ed.), 246. Car. 635; *Buchanan v. Moore*, 10 Serg. & R. 275. See *Long's Lessee v. Pellett*, 1 Har. & McH. (Md.) 531; *Smith v. Nowells*, 2 Litt. 159; 3 Phil. on Ev. (1849 ed.), 246.

It now remains to state that in lieu of an oath and the opportunity to cross-examine, it is inflexibly required that the declarations shall have been uttered *ante litem motam*. Upon this point the law concerning evidence of public or general rights is identical with the law relative to the introduction of hearsay evidence in matters of pedigree. As remarked by Lord Eldon, in a pedigree case:¹ "The admissibility of traditional evidence is founded upon the presumption that the words given in evidence are the natural effusion of the party, upon an occasion when his mind stands even, without bias to exceed the truth or fall short of it." With reference to the meaning of the term *lis mota*, which is much used in this connection, Mr. Justice Lawrence said:² "Declarations *post litem motam*—not merely after the commencement of the law suit, but after the dispute has arisen, for that is the primary meaning of the word *lis*—ought not to be received in evidence." After the controversy has originated, all such declarations are to be excluded. The courts insist that the dip into the stream of time which flows from the event in question shall be taken at some place above the point where strife or dissension may have polluted the water. If it appears that a controversy existed at or before the time of a declaration, the courts invariably reject it, without pausing to inquire whether the fact of the controversy was known to the declarant. Cases³ sometimes arise in which it appears that at the time of the declaration a controversy was being waged involving some collateral phase of the subject-matter. If it appears, however, that such controversy in no wise involved the question in issue the declaration will be received.⁴

§ 134. **Declarations of persons in pari jure.**—It has been urged that to receive the declaration of a person who stood *in*

¹ *Whitelock v. Baker*, 13 Ves., Jr., 511.

² *Monkton v. The Attorney-General*, 2 Russ. & Myl. 147.

³ *Berkeley Peerage Case*, 4 Camp. 401.

⁴ *Freeman v. Phillips*, 4 M. & S. 486; *Duke of Newcastle v. The Hundred of Broxlowe*, 4 B. & Ad. 273.

pari jure with the person tendering it, would be to receive the declaration of a person having an implied bias against the truth. But since the rejection of such evidence would be to largely dry up the sources of information—for but few persons would know about the right who were not interested in it—it is regarded that the necessities of the case warrant the receiving of the declaration, provided that there was no controversy at the time, and the declarant could gain no advantage from the statement. Thus, the declarations of deceased parishioners have been received relative to their claim of rights of common on the wastes, although their declaration tended to enlarge such common.¹ The same self-interest often exists in pedigree and other cases, but it is settled that the mere fact that the declarant stood *in pari jure* with the person offering the declaration will not suffice to exclude it.²

§ 135. **Proof of exercise of right.**—It was at one time held that evidence of reputation, or of declarations concerning matters of public or general right, must be corroborated by proof of acts of enjoyment within the period of living memory,³ but the courts now view the omission to prove such acts of enjoyment as a circumstance which goes merely to the weight of the evidence.⁴

§ 136. **Evidence admissible to defeat public right.**—It has been held at *nisi prius*,⁵ where the question was as to whether a certain place on the bank of a river was a public landing, that evidence of reputation was competent to defeat such claim of right, to the same extent that evidence would have been admissible to establish it. In deciding the case, Chief Justice

¹ *Nicholls v. Parker*, 14 East 331 M. See *Harwood v. Sims*, 1 Wight. 112; *Moseley v. Davies*, 11 Price 162; *Deade v. Hancock*, 13 Pr. 226; *Monkton v. Attorney-General*, 2 Russ. & Myl. 147. ² *Doe v. Tarrer*, Ry. & Moo. 141; 1 Phil. on Ev. (1849 ed.) 237, 271. See *Monkton v. Attorney-General*, 2 Russ. & Myl. 147.

³ *Weeks v. Sparke*, 1 Maule & S. 680; *Morewood v. Wood*, 14 East 328, n.; *White v. Lisle*, 4 Madd. 214.

⁴ *Crease v. Barret*, 1 Cr. M. & R. 919; *Steele v. Prickett*, 2 Stark. C. 409; *Curzon v. Lemon*, 5 Esp. 60; *Beebee v. Parker*, 5 T. R. 26.

⁵ *Drinkwater v. Porter*, 7 C. & P. 181.

Coleridge observed that there could be no distinction between the admissibility of evidence of reputation to establish a public right and such as might be offered to show that such right did not exist.

§ 137. **Verdicts, judgments, etc., as evidence.**—The extent to which verdicts, judgments and decrees are evidence is perhaps not generally understood. As stated by Mr. Freeman, in his work on judgments,¹ “A judgment is generally admissible in an action between strangers to it, to prove any point upon which hearsay is competent evidence.” This doctrine must not be confounded with the doctrine concerning reputation as evidence. The principle of admission in this class of cases is properly stated by Littledale, J., in ruling upon the admissibility of a verdict in proof of an ancient public right, as follows: “The finding of the jury, in the former proceeding, is as good evidence as reputation.”² It is to be recollected that we are dealing now with a class of cases in which the circumstances ordinarily forbid the hope of obtaining primary evidence, and it is therefore plain that the solemn adjudication of a competent tribunal concerning the right in controversy, particularly if entered many years before, must be even more satisfactory than hearsay evidence. The law is not settled as to whether the proceeding must be ancient to warrant its introduction,³ but it would seem that it should at least appear that it was had a sufficient number of years before the case in which such proceeding is sought to be introduced as evidence as to reasonably justify the court in presuming that at the time the matter was determined the tribunal entering the judgment or decree had better facilities for the making of the investigation. It is scarcely necessary to say, however, that such evidence may be received, although the investigation was had *post litem motam*.⁴ To render the proceeding admissible, the tribunal must have been a judicial one.⁵ A mere interlocutory order is not competent.⁶ The theory upon which verdicts

¹ 3d ed., § 419.

² *Brisco v. Lomax*, 8 Ad. & Ell. 198.

³ See, however, *Buller's N. P.* 233.

⁴ *Brisco v. Lomax*, 8 Ad. & Ell. 198.

⁵ *Rogers v. Wood*, 2 Barn. & Ad.

245. An award is not evidence. *Rex*

v. Cotton, 3 Camp. 444.

⁶ *Pim v. Carrol*, 5 M. & W. 266.

are admitted in such cases is not quite plain, although the competency of such evidence is established, at least in England.¹ Mr. Taylor suggests² that the fact that juries were formerly summoned *de vicineto* may have influenced the establishment of this exceptional practice of receiving verdicts as evidence.

§ 138. **Historical facts.**—In a United States case,³ Mr. Justice Story said: “Historical facts of general and public notoriety may, indeed, be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence; and when, from the nature of the transaction, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence. But the work of a living author, who is within the reach of the process of the court, can hardly be deemed of this nature.” It is required that the work shall be a general history,⁴ and it is not received as proof of the existence of a mere private right or of a particular custom.⁵ Although no such case has come to the writer’s notice, it may be suggested that a local history might be received concerning matters of general local interest, if there was such supplementary proof concerning the knowledge of the historian as would put his statement in line with other competent declarations.

¹ *Reed v. Jackson*, 1 East 355; *Briscoe v. Lomax*, 8 Ad. & Ell. 198; *City of London v. Clerke*, Carth. 181; *Cort v. Birkbeck*, 1 Doug. 218. In *Briscoe v. Lomax*, *supra*, Coleridge, J., said: “The necessity of a decree or judgment, to render the verdict admissible, exists only where it is sought to bind the parties conclusively by the finding.”

² *Ev.*, § 624.

³ *Morris v. Lessee of Harmer’s Heirs*, 7 Pet. 554.

⁴ *Evans v. Getting*, 6 C. & P. 586; *Buller’s Nisi Prius*, 248; *Morris v. Edwards*, 1 Ohio 189. See *Com. v. Alburger*, 1 Whart. R. (Pa.) 469.

⁵ *Buller’s Nisi Prius*, 248; *Cockman v. Mather*, 1 Barnardist 14, 2 C. B. 240; *Phil. on Ev.*, (1849 ed.) 123; *Morris v. Edwards*, *supra*; *Spalding v. Hedges*, 2 Barr (Pa.).

§ 139. **Common repute concerning private boundaries.**—It was declared by Lord Kenyon,¹ that “although a general right may be proved by traditionary evidence, yet a particular fact can not.” This statement accurately voices the expression of the English cases, and they rest upon the consideration that particular facts are not ordinarily a matter of notoriety and may be easily misunderstood or misinterpreted.² In a case where it is made to appear that a private boundary is coincident with a public one, there can, of course, be no objection to proving the latter by traditionary evidence.³ Upon the proposition that reputation is not evidence of particular facts English and American authorities substantially agree,⁴ but upon the question as to what are facts of general interest with reference to boundaries we have two lines of authority in this country. One line of cases holds that public boundaries are confined to such boundaries as separate counties, cities, townships and the like. The other line of cases holds that boundaries, and monuments for boundaries, under the United States system of surveys, come within the reason of the rule as established by the English authorities. The reasoning in favor of the latter view is exemplified by a Minnesota case,⁵ where the court said: “In the first place, the establishment of such boundaries is a public act, and not merely a private act or agreement between two owners of contiguous estates. In the second place, it may, and usually does, affect the interest of many persons. Thus, the location of the quarter-section post

¹ *Antrim v. Wood*, 5 Term R. 123.

² *Phil. on Ev.*, (1849 ed.) 245; *Meath v. Belfield*, cited by Butler, J., in *Rex v. Eriswell*, 3 T. R. 707; *Moseley v. Davies*, 11 Pr. 162; *Berkeley Peerage Case*, 4 Camp. 401; *Chatfield v. Fryer*, 1 Price 253; *Garnons v. Bernard*, 1 Anstr. 296; *Outram v. Morsewood*, 14 East 330, n.; *Cooke v. Banks*, 2 C. & P. 478; *Crese v. Barrett*, 1 Cr. M. & R. 919.

³ *Thomas v. Jenkins*, 6 Ad. & Ell. 525. The American cases would seem to warrant evidence of common re-

pute of a private boundary where it is the same as a public boundary. *Mullaney v. Duffy*, 145 Ill. 559, 33 N. E. Rep. 750, and see *Curtis v. Aaronson*, 49 N. J. L. 68, 7 Atl. Rep. 886, 60 Am. Rep. 584; *Boardman v. Lessees*, 6 Pet. 341.

⁴ But see *Tate v. Southard*, 1 Hawks (N. Car.) 45.

⁵ *Thoen v. Roche*, 57 Minn. 135, 58 N. W. Rep. 686, 47 Am. St. Rep. 600, and see, also, *Boardman v. Reed*, 6 Pet. 328.

affects a boundary of eight quarter-sections and thirty-two quarter quarter-sections; and, in the third place, highways are frequently laid out, and school districts may be established with reference to such boundaries." It will be recollected that in this section we are dealing only with common repute as evidence of boundaries. Within certain limits, evidence of declarations concerning private boundaries may be received, but this subject will receive attention in another portion of this chapter.¹

Declarations as to Pedigree.

§ 140. **General observations.**—These declarations stand on much the same ground as reputation concerning public rights. Some modifications of the doctrines concerning the latter exist, however, in cases of pedigree, but these modifications conform to principle. We have seen that the law rejects evidence of reputation of a mere matter of private right, and requires that the right should be public or general to admit such evidence. The reason for this, as has already been explained, is the fact that the members of the public are not likely to concern themselves with the affairs of individuals. In matters of pedigree, for the same reason, the law rejects the declarations of persons not connected with the family by blood or affinity; and it receives the declarations of persons who are so connected, not only because they are likely to know whereof they speak, but because they are likely to be the sole possessors of accurate information upon the subject. Of course, exceptions in fact may exist, but this can not engraft exceptions upon the law of evidence, which consists of practical rules for the ascertainment of truth, and which, if violated, would result in a burden of error vastly outweighing the advantage that might possibly be gained in exceptional cases.

§ 141. **Relationship.**—In *Johnson v. Lawson*,² the declarations of a housekeeper that a certain person was the heir of her

¹ *Post*, § 171.
13—Ev.

² *Johnson v. Lawson*, 2 Bing. 86.

employer were rejected. Chief Justice Best observed, in ruling upon the question, that the limitation to the declarations of relatives or members of the family, connected by blood or affinity, afforded a certain and intelligent rule; and if that were passed, it might be necessary on every occasion to enter into a long and almost endless inquiry as to the degree of intimacy or confidence which existed between the family and the party who had made the declaration. Notwithstanding contrary rulings at *nisi prius* before that time, and the intimations of eminent judges in accord with such *nisi prius* rulings,¹ *Johnson v. Lawson*² has since been treated as establishing the law upon the subject.³ Judge Taylor, whose declarations as to the law of England respecting evidence are entitled to much weight, says: "Though it was long doubtful whether the declarations of servants, friends and neighbors might not be received, the settled rule of admission is now restricted to hearsay proceeding from persons who were *de jure* related by blood or marriage."⁴ As respects blood relations, the courts have not fixed any limit of competency,⁵ but in a relationship by affinity only the declarations of the immediate parties to the marriage are received.⁶ Although it was once thought otherwise, it has now been determined that the declarations of a wife as to her husband's family are equally admissible with the declarations of a husband as to his wife's family.⁷ An objection

¹ *King v. Inhabitants of Eriswell*, 3 T. R. 719; *Weeks v. Sparks*, 1 M. & S. 679, 2 Bull. N. P. 290; *Bushnell v. Gore*, 9 B. Moore 187, n., and see *Dudley v. Grayson*, 6 T. B. Monroe (Ky.) 259; *Jackson v. King*, 5 Cow. 237, 15 Am. Dec. 468; *Jackson v. Cooley*, 8 Johns. 128; *Bennet v. Day*, 3 Wash. C. C. 243.

² *Johnson v. Lawson*, 2 Bing. 86.

³ *Sutton v. Ridgway*, 4 B. & Ald. 53; *Crease v. Barret*, 1 Cr. M. & R. 918; *Monkton v. Attorney-General*, 2 Russ. & M. 157; and see *Blackburn v. Crawford's Lessee*, 3 Wal. (U. S.) 175; *Stein v. Bowman*, 13 Pet. 209; *Dupoyster v.*

Gagoni, 84 Ky. 403, 1 S. W. Rep. 652; *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615; *Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207; *Norris v. Edwards*, 90 N. Car. 382, 47 Am. Rep. 526.

⁴ Law of Ev., § 935.

⁵ *Taylor on Ev.*, § 936, citing *Davies v. Loundes*, 7 Scott N. S. 140, 188; *Shrewsbury Peerage*, 7 H. of L. Cases 123.

⁶ *Shrewsbury Peerage*, 7 H. of L. Cases 1.

⁷ *Shrewsbury Peerage*, 7 H. of L. Cases 1.

was made in one case that a husband's declaration as to his wife's family was made after her death, but it was overruled, for the reason that although at the time of the declaration he was no longer connected with such family, yet he must have acquired his knowledge during the marriage.¹ Where a question arises as to whether two persons were related, a declaration of such fact may be competent, although the declarant was related to but one of the parties.² The umbilical cord between a declaration as to pedigree and its competency as evidence is the fact of relationship, and this fact must be manifested *de hors* the declaration.³ Slight circumstances, however, tending to prove the relationship may render the declaration *prima facie* competent.⁴

§ 142. **Declarations concerning legitimacy.**—There seems to be no legal objection to the evidence of a declaration of a deceased relative that a person was born out of wedlock.⁵ Even the declarations of deceased parents have been received to this effect.⁶ It would seem, however, that if a declaration

¹ *Vowles v. Young*, 13 Ves. Jr. 140, as explained by Burrough, J., in *Johnson v. Lawson*, 9 Moore 194.

² *Monkton v. Attorney-General*, 2 Russ. & M. 147; *Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 207.

³ *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. Rep. 780; *Blackburn v. Crawford's Lessees*, 70, 3 Wall. (U. S.) 175; *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615; *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. Rep. 1038; *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381; *Banbury Peerage Case*, 2 Selwyn N. P. 764. In the latter case the petitioner offered in evidence the declarations of his ancestor, in depositions taken one hundred and fifty years before in a chancery litigation, in which the declarant styled himself the legitimate son of A. B., but such declaration was held incompetent without proof of the relation-

ship. "But while it is quite clear that I can not prove my right to an estate of A., by proof that my father in his life-time declared that A. was his brother, yet I may do so by proving that A. so declared." *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381.

⁴ *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. Rep. 780; *De Leon v. McMurray*, 5 Tex. Civ. App. 280, 23 S. W. Rep. 1038.

⁵ *Goodright v. Moss*, 1 Cowp. 591; *Haddock v. B. & M. R.*, 3 Allen 298, 81 Am. Dec. 656; *Viall v. Smith*, 6 R. I. 417; *Taylor on Ev.*, § 637.

⁶ *Goodright v. Moss*, 1 Cowp. 591; *Haddock v. B. & M. R.*, 3 Allen 299, 81 Am. Dec. 656; *Taylor on Ev.*, § 637. The declarations of the wife's paramour are, of course, to be rejected. *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

of a deceased parent was merely a statement that his putative child was illegitimate, the testimony ought to be rejected, as his statement might be based on a state of facts that, if he were living, it would be incompetent to prove by his statement under oath.¹ The rigid adherence to the rule that the declarant must be a member of the family of the person whose pedigree is in question has led to the ruling that where the two were only related through the reputed father the declaration was not competent.² If this question can be considered open to discussion, it might be suggested that there is no reason, at least in such near putative relationships, why the negative of the fact of relationship should not be as much a part of the family history as the affirmative of such proposition.³ Both Mr. Taylor⁴ and Mr. Wharton⁵ state that the better opinion is that the declarations of a person subsequently deceased as to his own illegitimacy are incompetent, except as an admission against himself and his successors in title. Mr. Taylor cites the case of *Cooke v. Lloyd*,⁶ in which such a declaration was received, "as the representation of one of the family of the degree of relationship he bore to it." Mr. Taylor's objections to a person's declaration that he is illegitimate, viewed as one concerning the *status* of the declarant himself, is that as a bastard he has no family, and that he must have gained his information from the statement of others. As to Mr. Taylor's first objection, the writer has already intimated his opinion that it is a vain one; as to the second objection, it is refuted in almost every section of his chapter on pedigree. As bearing to some extent upon the last objection, attention may be called to a number of cases holding that even where the age of a person is an element in a criminal charge, such person may testify as to his age. This ruling is put on the ground not only that

¹ *Montgomery v. Montgomery*, 3 Barb. Ch. 132. *Shields v. Boucher*, 1 DeG. & Sm. 40, 52.

² *Bamford v. Barton*, 2 Moody & R. 28; *Northrop v. Hale*, 76 Me. 306, 49 Am. Rep. 615.

⁴ Taylor on Ev., § 636.

⁵ Whart. on Ev., § 203.

³ See, as supporting this view, the opinion of Knight Bruce, V. C., in

⁶ *Cooke v. Lloyd*, Peake's Ev. App. XXVIII.

the witness has gained some knowledge based on experience, comparison and observation, but that he may obtain such knowledge from his family history.¹

§ 143. **What is meant by pedigree.**—Questions of pedigree include not only descent and relationship, but also the facts of birth, marriage and death, the times when they occurred, and other matters of family history involved in genealogical controversies.² It is an unsettled matter as to how far courts will go in receiving collateral declarations, because of their bearing upon matters of pedigree. Where the question arose as to which of three children born at a birth was heir, the court received the declaration of the deceased father as to which was his eldest son, and also his further statement that he called them Stephanas, Fortunatus and Achaicus (according to the order of names in St. Paul's epistle), for the purpose of distinguishing their seniority, and the court also received evidence on the other side that an aunt who was present had declared that as the second and third of the children were born she tied strings around their arms to distinguish them from the eldest.³ It is probable, however, that the courts would reject a declaration where the inference from it as to pedigree was not a matter of necessary inference.⁴ According to the weight of authority, evidence of declarations as to the place of a person's birth, or of his residence, is competent where the inquiry is strictly one of pedigree.⁵ There is a line of

¹ *Banks v. Metcalf*, 1 Wheeler's Cr. 234; *Cheever v. Congdon*, 34 Mich. Cases 381; *Hill v. Eldridge*, 126 Mass. 296; *Houlton v. Manteuffel*, 51 Minn. 234; *Com. v. Phillips*, 162 Mass. 504, 185, 53 N.W. Rep. 541; *Taylor on Ev.*, 39 N. E. Rep. 109; *Watson v. Brewster*, 1 Pa. St. 381; *State v. Cain*, 9 W. Va. 559; *Cheever v. Congdon*, 34 Mich. 296; *State v. McClain*, 49 Kan. 730, 31 Pac. Rep. 790; *Morrell v. Morgan*, 65 Cal. 575, 4 Pac. Rep. 580.

² See *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. Rep. 1024; *Com. v. Stevenson*, 142 Mass. 466, 8 N. E. Rep. 341; *Hill v. Eldridge*, 126 Mass. 296; *Houlton v. Manteuffel*, 51 Minn. 234; *Com. v. Phillips*, 162 Mass. 504, 185, 53 N.W. Rep. 541; *Taylor on Ev.*, § 642.

³ Referred to by Lawrence, J., in the Berkeley Peerage Case, 4 Camp. 403, 418; 1 Phil. on Ev. (1849 ed.), 214.

⁴ See *Taylor on Ev.*, § 644.

⁵ *Wise v. Wynn*, 59 Miss. 588, 42 Am. Rep. 381; *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. Rep. 1024; *Byers v. Wallace*, (Tex. Sup.) 28 S. W.

cases in which evidence as to place of birth is rejected,¹ but these cases involve questions of settlement. At this point direct mention is to be made of a proposition just intimated, that it is not every case which involves a question as to birth, relationship, age or like questions, in which declarations are received. Where such a question is merely incidental, and the judgment will simply establish a debt for a person's liability on a contract, his proper settlement as a pauper, or some question of that character, the evidence is rejected.² The facts concerning pedigree recede so fast into oblivion that it is not insisted that such matter be ancient to warrant the introduction of the declarations of deceased persons.³

§ 144. Of what such declarations may consist.—Declarations concerning matters of pedigree may consist of conduct. As observed by Mansfield, C. J., in speaking of a father bringing up his putative son as legitimate: "This amounts to a daily assertion that the son is legitimate."⁴ At this point the doctrine of declarations concerning pedigree seems substantially co-incident with the doctrine of *res gestæ*. During the existence of the marriage relation between two persons, their conduct towards each other may be shown in a proper case as the equivalent of a declaration of relationship or pedigree, but, as the natural emanations and expressions of the relation, such evidence may rise to the higher plane of *res gestæ* evidence, which is always primary.⁵ The older authorities furnish many illustrations of declarations and conduct held competent

Rep. 1056; *Shields v. Boucher*, 1 D. G. 27 N. E. Rep. 1024; *Westfield v. Warren*, 3 Halst. (N. J. L.) 249; *Whit-tuck v. Waters*, 4 Car. & P. 375; *Haines v. Guthrie*, 13 Q. B. Div. 818, and authorities cited in last note.

¹ *Rex v. Erith*, 8 East 539; *Shearer v. Clay*, 1 Litt. 260; *Independence v. Pompton*, 4 Halst. (N. J. L.) 209; *Braintree v. Hingham*, 1 Pick. (Mass.) 245; *Wilmington v. Burlington*, 4 Pick. (Mass.) 174. See *Jackson v. People*, 5 Cow. 320.

² *Eisenlord v. Clum*, 126 N. Y. 552,

³ *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. Rep. 1024; 1 Phil. on Ev. (1849 ed.), 212.

⁴ *Berkeley Peerage Case*, 4 Camp. 401.

⁵ See *post*, § 283.

as coming within the law concerning proof of pedigree. Among others may be mentioned a declaration of relationship in a canceled will,¹ engravings upon rings, charts of pedigree, armorial shields, etc. Entries in family Bibles and records are admissible without proof that they were made by members of the family, for they amount to family acknowledgments.² It must not be forgotten, however, that evidence of declarations of pedigree is only secondary, and before it can be admitted the absence of the primary evidence must be accounted for.³ Inscriptions on tombstones and coffin-plates are received as evidence.⁴ Such declarations are admitted upon the principle of family acknowledgments, because of the presumption that if the statements were incorrect they would not pass uncontradicted, and possibly the evidence may be said to be admissible upon the broader principle that the persons who made such statements must have known the truth and had no object to misstate the facts.⁵ Certain facts may be proved by parish records and other documentary evidence, where the entries are made by third persons, but the admissibility of such entries rests on another ground.⁶

¹Johnson v. Earl of Pembroke, 11 East 504. If a declaration in a deed as to heirship is competent on the ground that it amounts to a declaration concerning pedigree, it is proper evidence, in the absence of better evidence, even as against strangers. Bqwsor v. Cravener, 56 Pa. St. 132; Scharff v. Keener, 64 Pa. St. 376; McMurtry v. Keifner, 36 Neb. 522, 54 N. W. Rep. 844; Chamblee v. Tarbox, 27 Tex. 139, 84 Am. Dec. 614. But unless a deed can be made competent on such ground, it is not evidence as against persons who are not privies. McMurtry v. Keifner, 36 Neb. 522, 54 N. W. Rep. 844; Potter v. Washburn, 13 Vt. 558, 37 Am. Dec. 615; Hardenburg v. Lakin, 47 N. Y. 109; Carver v. Jackson, 4 Pet. (U. S.) 1; Murphey

v. Loyd, 3 Whart. (Pa.) 538; Yahoo-la, etc., Mining Co. v. Irby, 40 Ga. 479; Lamar v. Turner, 48 Ga. 329.

²Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67; Leggett v. Boyd, 3 Wend. 376; Moakton v. Attorney-General, 2 Russ. & M. 147.

³Taylor v. Hawkins, 1 McCord 164; Dobson v. Cothran, 34 S. Car. 518, 13 S. E. Rep. 679; Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67; Leggett v. Boyd, 3 Wend. 376.

⁴Goodright v. Moss, Cowper 591; Bullen's N. P. 233; Haslam v. Crow, 19 W. R. 969; McClaskey v. Barr, 54 Fed. Rep. 781; Smith v. Patterson, 95 Mo. 525, 8 S. W. Rep. 567.

⁵Haslam v. Crow, 19 W. R. 969; McClaskey v. Barr, 54 Fed. Rep. 781.

⁶Post, § 170.

§ 145. **Declarations admissible although not based on personal information.**—If a declarant be competent, and makes a declaration concerning a matter of pedigree, the law does not exclude such evidence even if it appear that the declarant had no personal knowledge upon the subject. Evidence of declarations as to family repute are competent,¹ and even declarations based on the declarations of another member of the family have been received.² Where the issue was as to whether a man was dead at a certain time, the declaration of his deceased wife was received that subsequent to that time she had received a letter from him.³

§ 146. **Must be ante litem motam and declarant must be dead.**—The last proposition is an obvious one, and the former one has been discussed at length in connection with declarations concerning matters of public or general interest.⁴ It only remains to add to that discussion the statement that the mere fact that a declaration concerning pedigree was made for the express purpose of declaring and establishing facts will not suffice to exclude it, provided it was made before the *lis mota* and was not in effect a preparation for future litigation.⁵ In this connection attention may again be called to the proposition that the fact that the declaration is made by a person *in pari jure* with the person tendering it does not render it inadmissible.⁶

§ 147. **Verdicts, judgments, etc., as evidence of pedigree.**—The reader's attention is directed to a discussion of this subject in another connection.⁷

§ 148. **Weight to be given to evidence of reputation.**—In a King's Bench case⁸ Lord Ellenborough said: "Reputation is, in

¹ Banning v. Griffin, 15 East 294.

² Futter v. Randall, 2 M. & P. 20; Monkton v. Attorney-General, 2 Russ. & M. 147; Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. Rep. 1024.

³ Norris v. Edwards, 90 N. Car. 382, 47 Am. Rep. 526.

⁴ Ante, § 133.

⁵ Munn v. Mayes, (Tex. Civ. App.)

30 S. W. Rep. 479; Monkton v. Attorney-General, 2 Russ. & M. 147; Goodright v. Moss, Cowper 591; Berkeley Peerage Case, 4 Camp. 401.

⁶ Ante, § 134.

⁷ Ante, § 137.

⁸ Weeks v. Sparke, 1 M. & Sel. 680.

general, weak evidence; and when it is admitted, it is the duty of the judge to impress on the minds of the jury how little conclusive it ought to be, lest it should have more weight with them than it ought to have."¹ This observation is to some extent applicable to evidence of the declarations of deceased persons; such declarations, if oral, possess even more infirmities than evidence of verbal admissions. It admits of doubt, however, whether, under the practice as it exists in most of the state courts, the trial judge would be justified in going further in his instructions upon this subject than to direct the attention of the jury to the considerations which suggest to the mind the possibility of error in giving too great a degree of credence to such testimony.

Ancient Instruments and Declarations with Reference to Ancient Possessions.

§ 149. **Instruments thirty years old—Proper custody.**—In view of the difficulty which would ordinarily attend the effort to prove the due execution of an instrument which was more than thirty years old, the law presumes in favor of its due execution, provided that there are no circumstances which justly infect it with suspicion, and it comes from the proper custody.² The purpose of the latter requirement is to give authenticity to the instrument.³ If the above circumstances combine, the law very justly throws the *onus* upon the party who would impeach the instrument. Attention need not be given to the illustrations of the English cases generally as to what is a proper custody, for such illustrations would afford but little aid to the practitioner or student of to-day. The most valuable expression upon this subject is found in a North Carolina case,⁴ in

¹ And see *Morewood v. Wood*, 14 East 328, 330. *Wynne v. Tyrwhitt*, 4 Barn. & Ald. 376; *Thomas v. Benyon*, 12 Adol. & E. 431; *Bertie v. Beaumont*, 2 Price 303; *Fenwick v. Reed*, 6 Madd. 8; *Thomas v. Beyton*, 4 P. & D. 193.

² This principle of evidence applies not only to formal instruments but to informal papers, such as receipts, letters, etc. *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. Rep. 679; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. Rep. 376;

³ 1 Starkie on Ev., star p. 332.

⁴ *Meath v. Winchester*, 3 Bing. N. C. 283.

which Tindall, C. J., said: "Documents found in a place in which, and under the care of persons with whom, such papers might naturally and reasonably be expected to be found, are precisely in the custody which gives authenticity to documents found within it, for it is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there would never be any question as to their authenticity; but it is when documents are found in other than their proper place of deposit, that the investigation commences whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they were actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree, some more so, some less; and in these cases the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine."

§ 150. **Allunde proof of age not necessary.**—While the lack of marks of antiquity might afford a suspicion sufficiently great to exclude an instrument, yet in the absence of discrediting circumstances it is sufficient proof of the age of the instrument if it purports to be thirty years old.¹ In the case of a will the thirty years are to be computed from the date which the will bears, and not from the death of the testator.²

§ 151. **Not necessary to prove possession under instrument.**—Mr. Phillips, in his work on evidence,³ contends that to permit a deed to go in evidence without proof of its execution it

¹ See *Jackson v. Laroway*, 3 Johns. Cas. 283; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. Rep. 1049; *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365, 20 Atl. Rep. 497, and cases cited.

² 1 Starkie on Ev., star p. 330; *Fenwick v. Reed*, 6 Mad. 8.

³ *Man v. Ricketts*, 7 Beav. 93. See *Staring v. Bowen*, 6 Barb. 109.

⁴ Phillips on Evidence, (1849 ed.) 276.

must be further authenticated by a showing of possession under it. While a few American cases have followed Mr. Phillips on this proposition, the weight of authority, both of court and text-writer, justifies the statement that the lack of possession is only a circumstance going to the weight of the evidence.¹ Professor Greenleaf states² that "if a deed is found in the proper custody, and is corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it is to be presumed that the deed constituted part of the actual transfer of the property therein mentioned." A number of American courts have used substantially this language,³ although it would seem that it was inaccurate, in that the idea is at least implied in the statement that the instrument must be corroborated in some other manner in addition to evidence that the deed came from the proper custody. Mr. Starkie, whose work on evidence is exceptionally accurate, says: "If the deed or other instrument, when produced, appear to be thirty years old, no further proof is required."⁴ Mr. Best contents himself with stating that to guard against the manifest dangers of this kind of proof it "is established, as a condition precedent to its admissibility, that the document must be shown to have come from the proper custody."⁵ Judge Taylor says:⁶ "Care is especially

¹ *Applegate v. Lexington Mining Co.*, 117 U. S. 255, 6 Sup. Ct. Rep. 742; *Dishazer v. Maitland*, 12 Leigh 524; *Barr v. Gratz's Heirs*, 4 Wheat. 213; *Carroll v. Norwood*, 1 Har. & J. 174.

Hewlett v. Cock, 7 Wend. 371; *Caruthers v. Eldridge*, 12 Gratt. 670; *Harlan v. Howard*, 79 Ky. 373; *Jackson v. Laroway*, 3 Johns. Cases 283; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. Rep. 1049; 1 Greenl. on Ev., § 144, note; Whart. on Ev., § 199; Taylor on Ev., § 665. See *Shaller v. Brand*, 6 Binn. 439, 6 Am. Dec. 482; *Lau v. Mumma*, 43 Pa. St. 267; *Bank of Middlebury v. Rutland*, 33 Vt. 414; *Homer v. Cilley*, 14 N. H. 85; *Thompson v. Bullock*, 1 Bay (S. Car.) 364; Middle-

ton v. Mass, 2 Nott & McC. 55; *Dishazer v. Maitland*, 12 Leigh 524; *Carroll v. Norwood*, 1 Har. & J. 174.

² 1 Vol. on Ev., § 144.

³ *Applegate v. Lexington Mining Co.*, 117 U. S. 255, 6 Sup. Ct. Rep. 742; *Stroud v. Springfield*, 28 Tex. 649.

⁴ Vol. 1, star p. 330, and see star p. 332. At star p. 67, Mr. Starkie says that "in order to give it any weight, it should be supported by proof of possession or enjoyment, corresponding and consistent with it."

⁵ 2 Vol. on Ev., § 499.

⁶ Ev., § 659.

taken to ascertain the genuineness of the ancient documents produced, and this may in general be shown, *prima facie*, by proof that they come from the proper custody." If the document was found in a place where it would not naturally be sought, it is necessary, in order to show that the paper was in proper custody, to show where it had been kept.¹ If it is produced by one who has an interest in it, there must still be affirmative proof, according to the later view, as to where the document was found.²

§ 152. **Document a little more than thirty years old merely presumed to be genuine.**—The mere fact that a deed is a little more than thirty years old does not give rise to the presumption that the grantor had title.³ The most that can be affirmed is that in respect to genuineness such a deed proves itself.⁴ If there is proof of long possession, there may be a presumption drawn in favor of such possession.⁵

§ 153. **Rule where document very ancient.**—If, for example, a deed is offered in evidence which is dated thirty-one years ago, and is shown to have come from the proper custody, it goes in evidence without calling witnesses to prove its execution. As stated in the preceding section, it proves itself. But it will be remembered, even if the presumption in favor of authenticity was more than *prima facie*—if it was conclusive,—the establishment of the authenticity of the deed is a fact which might co-exist with the fact that the grantor had no title to the

¹ Buller's *Nisi Prius*, 255, 648; 1 Starkie on Ev., star p. 632.

² Taylor on Ev., § 664, citing *Evans v. Rees*, 10 A. & E. 151. See *Rex v. Ryton*, 5 T. R. 259. See *Ely v. Stewart*, 2 Atk. 44; *Fry v. Wood*, Sel. N. P. 535; *Rex v. Netherthong*, 2 M. & S. 337.

³ *McClellan v. Zwingle*, 70 Hun 600, 24 N. Y. Supp. 371.

⁴ *Bell v. Brewster*, 44 Ohio 690, 10 N. E. Rep. 679.

⁵ See *Stevenson's Heirs v. McReary*, 12 S. & M. (Miss.) 9, 51 Am. Dec. 102; *Buhols v. Boudousquie*, 8 Mart. N. S. 153; *Knox v. Jenks*, 7 Mass. 488; *Coleman v. Anderson*, 10 Mass. 105; *Pejepscut Proprietors v. Ransom*, 14 Mass. 145; *Hazard v. Martin*, 2 Vt. 77; *Blair v. Kiger*, 111 Ind. 193, 12 N. E. Rep. 293.

land and the further fact that every recital in the deed was false. The standard writers on evidence generally, with the exception of Starkie, leave the inference, if a deed is more than thirty years old, and is entitled to be introduced in evidence, that the authorities give countenance to the view that the deed is some evidence of title in the grantor. But when the authorities are examined it will be found that the documents received for such purpose are of a much greater age than thirty years.¹ It is not strange, however, that the text-writers have not given anything more than a general recognition to this proposition, for they ordinarily only follow where the cases lead, and it must be confessed that the courts have not usually expressed themselves upon the subject with that definiteness which makes the law certain. A number of the authorities which, upon superficial consideration seem strong and clear upon the subject, are impaired in their force as precedents by the consideration that the instruments were acts of dominion with reference to what was a matter of public or general right, so that their admissibility might be claimed on another ground; but, taking the utterances of the judges together, without too nice a discrimination between the points in judgment and the *dicta*, and considering whatever of formative influence the expressions of the text-writers have had, and it may be affirmed that very ancient acts of dominion may be shown, as some evidence of title.² This doctrine has obtained a foothold in the United States,³ and it

¹ This fact has not escaped the attention of the writer of the article on ancient documents in the American and English Encyclopedia of Law. He says: "As to the age of a document admissible to show ownership, it would seem that such document must be older than an 'ancient document,' as that phrase is used in regard to proof of authenticity. In most of the cases the documents admitted have been more than a hundred years old. In *Clarkson v. Woodhouse*, 3 Doug. 189, a lease fifty years old was rejected, while leases

eighty years old and more were admitted. The youngest document admitted on this ground was over sixty years old. *Boston v. Richardson*, 105 Mass. 351."

² *Rogers v. Allen*, 1 Camp. 309; *Clarkson v. Woodhouse*, 5 T. R. 412; *Yates v. Harris*, Hil. Ass. 1702, cited by Gilbert's Ev., 3d ed. 78; *Newburgh v. Newburgh*, 5 Madd. 223; *Biddulph v. Ather*, 2 Wils. 23; 2 Evans' Pothior, 292; *Taylor on Ev.*, § 463; 1 Starkie on Ev., star p. 66; 1 Greenl. on Ev., § 144.

³ *Boston v. Richardson*, 105 Mass. 351.

must be admitted that it is eminently reasonable to admit evidence of such acts, where the claim of right antedates living memory.¹ Professor Greenleaf's view is that this class of evidence is *res gestæ*, as ancient documents purport to be "a part of the transactions to which they relate."² This suggestion is not without value, for it at least puts the mind into the proper channel of thought. But it is not possible to thus lift this class of evidence onto the plane of primary evidence. To be *res gestæ* the connection between the document and principal act must be shown, and as that is confessedly impossible, it is evident that the most that can be done is to claim the establishment of the doctrine as an exception to the ordinary rule, to the extent that proof of the connection between the principal act and the document is dispensed with. Mr. Starkie gives the following excellent statement of the philosophy of the exception: "As the possession and enjoyment of disputed property are always indirect evidence of right, by reason of the obvious and natural presumption, when the right is in other respects doubtful, that such possession and enjoyment so acquiesced in had a lawful origin; so acts of open delivery of possession, or written statements by which a dominion over such property was exercised, and with which the possession and enjoyment corresponded, are also presumptive evidence of right; for these are, in fact, not mere recitals of a fact, but are themselves acts of dominion and ownership. Hence when such instruments are so ancient that their connection with acts of enjoyment and dominion can not be proved by the testimony of living witnesses, they are nevertheless admissible as the best and most proximate evidence to explain the origin and nature of such possession and enjoyment, where they can by other evidence be sufficiently connected with those facts. Hence, it seems that to support any presumption or inference from such an instrument, first, its antiquity is essential; secondly, that it should have been found in the place or repository in which a true and genuine deed or writing of that kind would have been deposited; thirdly, that it should be free from all suspicion which may

¹ Necessity will not alone justify the *Mima Queen v. Hepburn*, 7 Cranch 291. introduction of hearsay testimony. ² Greenleaf on Ev., § 144.

rebut the presumption raised in its favor; fourthly, in order to give it any weight, it should be supported by proof of possession or enjoyment, corresponding and consistent with it. Upon such a connection the force, if not the admissibility, of such evidence actually depends. Declarations are, as has been seen, evidence explanatory of the act which they accompany; and where long continued enjoyment, and user of a right, has been proved, extending as far back as the duration of human life will permit, a deed or writing which is consistent with such usage and enjoyment, and explanatory of it, may, under the same principle, be fairly admitted, as affording a presumption that it was a genuine instrument which has been used and acted upon. And where proof of the actual execution and use of such instruments would have been evidence, then when such proof is absolutely excluded by lapse of time, the production of the deed, coupled with such circumstances as give it credit, appears to be the next best evidence which the case admits of, and when accompanied with proof of actual enjoyment, affords a strong presumption as to the existence of the right according to that deed."¹

Declarations Against Interest by Persons Deceased as Evidence Against Third Persons.

§ 154. **Declarations of persons deceased.**—If the statement of a third person, against his pecuniary interest, were offered, such statement would be calculated to lead the mind to a belief that what was thus said was true, but the incontestable objection to the statement in a court of justice would be, if the declarant was in life, that his statement under oath would be of a higher class of evidence. Where, however, the declarant is dead,² the law, within limits, receives his declarations, even as against strangers. His declarations, however, can not derogate from a title which he is estopped to dispute.³

¹ Starkie on Ev., star p. 66.

² If the declarant is insane, his declarations may go in evidence as if he were dead. *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181. The declarations of a person who could not be

compelled to testify were received in one case on the same principle. *Hariman v. Brown*, 8 Leigh 697.

³ *Papendick v. Bridgwater*, 5 E. & B. 166.

§ 155. **Must be against pecuniary interest.**—The declaration must be against the pecuniary or proprietary interest of the declarant.¹ For this reason, on an issue in ejectment, the declaration of the plaintiff's deceased ancestor to the effect that his relatives, who were claiming by adverse possession, were allowed to occupy the premises as a matter of charity on his part, was held incompetent.² In another case the declaration of an ancestor as to his intent to treat certain moneys, turned over to certain of his children, as advancements, not being a part of the *res gestæ*, and having been made subsequently, was held inadmissible, since it did not affect him personally whether the money was treated as a gift or as an advancement.³ It is not enough to render the statement admissible that it amounts to an affirmation of a matter which, if true, would render the person liable to prosecution.⁴ Instances, of course, occur where a declaration involves pecuniary as well as criminal liability. Thus, in a suit against a county treasurer for failing to account for certain moneys, it was held that the declarations of a third person, subsequently deceased, who was employed in the office by the board of supervisors, that he had converted the money and falsified the books, were evidence in favor of the defendant.⁵ "It seems not to be sufficient," observes Professor Greenleaf, "that in one or more points of view, a declaration may be against interest, if it appears, upon the whole, that the interest of the declarant would be rather promoted than impaired by the declaration."⁶

§ 156. **Need not be connected with principal act.**—It is to be recollected that this class of declarations is received because

¹ *Sussex Peerage Case*, 11 Cl. & F. 85; *Davis v. Lloyd*, 1 Car. & K.; *Regina v. Exeter*, L. R. 4 Q. B. 341; *Bird v. Hueston*, 10 Ohio St. 418. See *Tate v. Tate*, 75 Va. 522.

² *Duff v. Leary*, 146 Mass. 533, 16 N. E. Rep. 417.

³ *Thistlewaite v. Thistlewaite*, 132 Ind. 355, 31 N. E. Rep. 946. At this point attention is called to a line of cases in which mere hearsay declara-

tions of a person since deceased are held incompetent in prosecutions for crime, although such declarations, if accepted as true, would work an acquittal. See, *post*, § 227.

⁴ *Sussex Peerage Case*, 11 Cl. & Fin. 85.

⁵ *Scott Co. v. Fluke*, 34 Iowa 317. See *Mahaska Co. v. Ingalls*, 16 Iowa 81.

⁶ *Ev.*, vol. 1, § 149.

such declarations were made against interest. It is this consideration principally which raises them above the level of mere *res inter alios* declarations. They must, however, be broadly distinguished from *res gestæ* evidence, which owes its admissibility to the fact that it is connected with the event or act in question. From those observations it will be plain that the fact that a declaration made by a deceased person against his interest was separated by a considerable space of time from the event or act his admission related to, will not render the declaration incompetent, although it may affect its weight.¹ The competency of the declaration is not affected by the consideration that it was not made in the course of a business transaction.²

§ 157. **Peculiar knowledge of declarant.**—It is ordinarily the case, where declarations of deceased persons are sought to be introduced, that the fact is apparent that they had adequate knowledge at the time of the declaration. Whether the fact of such knowledge must appear, to make the declaration competent, is not an entirely settled question, although the greater authority, and the weight of reason, justifies the statement that the fact that the declaration was against interest gives a sufficient assurance of knowledge to admit the declaration, unless, indeed, the statement should carry on its face the evidence of a want of knowledge, or the surrounding facts should make it apparent.³

§ 158. **Some phases of subject discussed in connection with next topic.**—The next topic it may be said, in view of the course of the adjudications, is a graft upon the topic we are now concluding, if, indeed, it is not, as some contend, one and

¹ Scott v. Berkshire Sav. Bank, 140 Mass. 157, 2 N. E. Rep. 925; Dean v. Wilkerson, 126 Ind. 338; 26 N. E. Rep. 55; Doe v. Turford, 3 Barn. & Ad. 890; 1 Greenl. on Ev., § 147, and cases cited; 1 Phil. on Ev., (1849 ed.) 294, n.

14—Ev.

² Doe v. Turford, 3 Barn. & Ad. 890.

³ Doe v. Turford, 3 Barn. & Ad. 890; Crease v. Barrett, 1 C. M. & R. 918; 1 Starkie on Ev., star p. 298. Consult Taylor on Ev., § 669; County of Mahaska v. Ingalls' Executors, 16 Iowa 81.

the same topic. While the writer does not take this view, it is recognized that the subjects have some phases in common, and, therefore, the attention of the reader is directed to whatever of supplementary discussion is found in the following pages.

Declarations by Deceased Persons in Ordinary Course of Business.

§ 159. **Preliminary observations as to declarations in course of business.**—Clearness is especially important at this point, not only because there is an inherent liability to confusion, but because the subject has been confused to some extent by courts and text-writers. The class of declarations we are about to consider do not owe their admissibility to the fact that they are against interest, as in the class of cases we have just been considering, but to the fact that they are entries made in the course of business, and furthermore, they are to be distinguished from mere shop-book entries (which are only evidence between seller and buyer), for entries of the character that now engage our attention may be evidence against strangers. Declarations in the ordinary course of business and declarations against interest occupy common ground in respect to the fact that they constitute an inferior class of evidence which is resorted to because the declarant can no longer speak.

§ 160. **Ground of admission.**—This exception to the law excluding hearsay evidence rests on a recognition of the proposition that if a person in the ordinary course of his business commits a statement to writing, such statement is probably true, for it would not ordinarily conserve his purpose if he stated other than the fact. As the court said in a Massachusetts case:¹ “What a man has actually done and committed to writing when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to a jury.”²

¹ *Welsh v. Barrett*, 15 Mass. 380.

may be proved by a party's own

² Without being committed to the books, although the person making proposition that an independent fact the entry can be called, the following

§ 161. **Statement need not be against interest.**—Reference has already been made to the fact that courts and text-writers have confused declarations against interest with the class of declarations we are considering, and the point of confusion has been the insistence in the latter class of cases that the entry must be against interest. Judged by the standard of what the English courts have said, rather than by what they have ruled, and it must be admitted that the element of opposition to the declarant's interest is an essential one, at least in business, as distinguished from professional entries. There are, however, rulings and expressions among the English cases which show a tendency in the other

quotation is made from the case of *Donovan v. Boston, etc., R. Co.*, 158 Mass. 450, 33 N. E. Rep. 583, as illustrative of the fact that business entries have a probative force: "The principal question is whether the train sheet, with the testimony of the witness who made the entries upon it, was competent evidence for the defendant. It is clear that the sheet was worse than useless if its statements, as seen by the dispatcher, were not accurate. Every interest of the defendant demanded that an entry, when made, should be true; and no reason can be conceived why the defendant should procure or permit a false or incorrect entry to be placed under the eye of the official who controlled the movement of its trains; nor is there any reason to presume that the operator who observed the passing of the trains at a station and telegraphed the information to the dispatcher's office, or the person who there received the messages and made the entries on the sheet, had any interest to misstate the facts or to make false entries. The system was the established course of the defendant's business, so that the sheet was not an accidental memorandum; and

every step by which the information spread upon it was gathered, transmitted and entered was an act performed by some person in the line of his duty and in the usual course of his employment, under a sanction tending to make his statements true, and these acts were so connected with and dependent upon each other as to form parts of one transaction. If the sheet had been used and kept in the course of business by a third person, and not by the party by whom it was offered, there is authority in the decisions of this court for its competency. In *Briggs v. Rafferty*, 14 Gray, 525, after evidence that the plaintiff's clerk had marked packages of goods and sent them to be carried by rail to the defendant's place of residence, a servant of the railway corporation produced its regular freight business books, kept by himself, and testified that, while he had no personal recollection of the facts, he had no doubt the entries in them were correct, and that the transactions therein recorded took place, and the evidence was held competent to prove the delivery of the goods at their place of destination. As the corporation received the goods in

direction. Thus, in one case,¹ Lord Ellenborough, in holding competent an entry of charges in an attorney's book, which were marked paid, says that "the ground upon which

Boston and delivered them in Lawrence, and no other witnesses than the book-keeper appeared in support of the entries, and as it is apparent that they could not have all been made upon the personal knowledge of the book-keeper, the evidence was held competent upon no better footing than the train sheet in the present case, except that the latter was made by a servant of the party in whose favor it was offered, and is thus evidence which it has made for itself. In *Adams v. Coulliard*, 102 Mass. 167, 173, entries from railway freight books were held to have properly been read to the jury, although it does not appear that the persons who made out the way bills, from which some of the entries were made, were called as witnesses, the court saying that 'inferences of fact are always to be legitimately drawn from the known course of business.' In these two cases the entries were declarations which tended directly to support the right of the carrier to claim compensation for a service, and one purpose of making them was to preserve evidence in support of a claim. In *Townsend v. Pepperell*, 99 Mass. 40, 43, 46, the account of the medical history of the case of a patient in the Massachusetts general hospital was held competent evidence, when produced by the superintending physician, although he testified that he did not know by whom the entries were made, and that the book in which the account was entered was one of a series in his custody, in which, in the regular course of business of the hospital, it was the duty of the physicians to enter the history of the

cases under their charge, and in *Costello v. Crowell*, 133 Mass. 352, 355, a book entry, identified by the testimony of the book-keeper who made it, was held competent to prove a date, although it does not appear that the fact stated in the entry was within his personal knowledge, and no other witness was called in support of it. In our opinion, because there is no reasonable possibility that any designed untruth had part in placing upon the train sheet the statements of which it is the vehicle, and all known circumstances concerning it favor its accuracy, and because it was an act rather than a declaration, and was sufficiently identified as genuine, it was competent evidence without the production or proof of the death of the operator who sent the messages, and its entries, material to the issue, were admissible and proper for the jury to consider, notwithstanding the fact that it was made by the servants of the party by whom it was offered. Entries possibly similar, offered by the corporation by whose servants they were made, were held inadmissible in *Pittsburg, etc., R. Co. v. Noel*, 77 Ind. 110, 121, because in the opinion of the court neither *res gestæ* nor public records, but private entries in the private books of the company, made by its agents in the course of its business. But in the present case the train sheet, with its entries, and the messages from which they were made, were acts rather than declarations, and acts done before any controversy had arisen, when all concerned had no interest except to know and to state the truth."

¹ *Doe v. Robson*, 15 East 32.

their evidence has been received is, that there is a total absence of interest in the persons making the entries. In another case,¹ *Le Blanc, J.*, observed: "I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person; it is not necessary now to determine that question; but I would not be bound at present to say that they are not evidence." In a later case,² Lord Eldon said: "The cases satisfy me that evidence is admissible of declarations made by persons who have a complete knowledge of the subject to which such declarations refer, and where their interest is concerned; and the only doubt I have entertained was as to the position that you are to receive evidence of declarations where there is no interest. At a certain period of my professional life, I should have said that the doctrine was quite new to me; I do not mean to say more than that I still doubt concerning it."³ The question under consideration

¹ *Higham v. Ridgway*, 10 East 109.

² *Barker v. Ray*, 2 Russ. 63.

³ *Starkie*, whose discriminating judgment is recognized by those familiar with his writings, says: (*Ev.*, Vol. 1, star p. 298.) "It may, however, be observed, that the consideration that the entry was made in the course of discharging a professional or official duty, or even in the ordinary course of business in which the party was engaged, seems both in reason and upon the authorities to afford a much safer warrant for giving credit to such evidence, than is supplied by the consideration that the entry or declaration might possibly have been used to the prejudice of the party, and in many instances the doctrine of admissibility on that ground has been pushed to an extraordinary, if not untenable extent. * * * Let it, by way of illustration, be supposed, that an attorney has on the same book

two accounts, in one of which are contained the items in detail relating to the marriage settlement of A, in the other a similar detail relating to the marriage settlement of B; that the first appears to have been paid, the other does not, it may be asked, is any man's mind so constituted, that whilst he believed the former entries to be true, he could withhold his belief as to the latter; could any one, in the absence of all suspicion of fraud, believe that a professional man would misspend his time by indicting a string of falsities, asserting that he took such and such instructions, and prepared this or that conveyance, without aim or object? If any one could conceive to himself, in the absence of any evidence to justify such a supposition, that the latter account was inserted for some sinister purpose or other, would it not occur that the admission of payment, tacked to

arose in a Maine case,¹ and Shepley, J., in pronouncing the judgment of the court, said: "It has been considered in several of the states that neither the best administration of justice, nor any well established rule, required the adoption of the limitation that the entry must appear to have been made against the interest of the party making it, and the decisions of this country are more in accordance with those of *Warren v. Greenfield*² and *Doe d. Pattershall v. Turford*,³ than with most of the English cases." The case just quoted from fairly voices the American authorities.⁴

the other, could not repel a similar suspicion as to its truth. What warrant could the admission of payment afford to obviate such a suspicion? How could the party be prejudiced by admitting that he was paid for business that was never done? On the same ground, therefore, that credit was given to the former, viz.: the improbability of invention for some unknown sinister purpose, some, if not the same degree of credit, would also be given to the other. A presumption arises from the usual course of affairs, that an entry made by a professional man was made at the time, or nearly so, of the date, such an entry is not to be considered as equal in force to direct evidence of the fact, the tests of an oath, and of cross-examination, being wanting, but it is impossible to say that it is not evidence which in itself affords a reasonable presumption as to the truth of the fact to which it relates, because it would be contrary to the usual course of human affairs, and to the experience of mankind, that a person who must have known whether the fact which he recorded was true or false, should have wantonly, and long before the importance of such a document could have been foreseen, and therefore, without any con-

ceivable motive, have stated that which was false rather than that which was true." Mr. Phillips says: "There seems, however, to be more reason for considering that a rule exists, which allows of declarations of deceased persons being received in evidence, even though not made against their interest, provided that in addition to a peculiar knowledge of the facts, and the absence of all interest to pervert them, the declarations appear to have been made in the ordinary course of official, professional, or other business or duty, and to have been immediately connected with the transacting or discharging of such business or duty, and to be contemporaneous or nearly contemporaneous, with the transaction to which they relate." *Ev.*, Vol. 1 (1849 ed.), 318.

¹ *Augusta v. Windsor*, 19 Me. 317.

² *Warren v. Greenville*, *Strange* 1129.

³ *Patteshall v. Turford*, 3 B. & Ald. 890.

⁴ *Chaffee v. United States*, 18 Wall. 516; *Welsh v. Barret*, 15 Mass. 380; *State v. Phair*, 48 Vt. 386; *Barber's Admr., v. Bennett*, 58 Vt. 476, 4 Atl. Rep. 231, 56 Am. Rep. 565; *Bridge-water v. Roxbury*, 54 Conn. 213, 6 Atl. Rep. 415; *Batchelder v. Sanborn*, 22 N. H. 325; *Wheeler v. Walker*, 45

§ 162. **Business entries of deceased persons may prove facts in collateral controversies.**—If a person have a peculiar means of knowing a fact, and make a written entry of it in the ordinary course of business, such entry, upon his decease, is competent evidence in a collateral controversy, provided always that the declarant stood wholly disinterested as to such collateral controversy. The case of *Higham v. Ridgway*,¹ reported in *Smith's Leading Cases*, while it holds to the view that the entry must be against interest, is an important case. It was there held that a charge by a deceased person for attending upon a woman in childbirth, which charge was marked paid (on this ground the entry was conceived to be against interest) might be introduced in evidence upon an issue as to the age of the child: In a Maine case,² it was held that the date when a person broke his leg might be proved by an entry in the book of a deceased physician making a charge against him for reducing the fracture. In a Vermont case,³ it was held competent, in a prosecution for murder, where it became important to prove that the defendant pawned the watch of the deceased, to introduce an entry in a book of the person to whom it was claimed the watch was pawned, and who was deceased, showing the repairs made, and containing the number and description of the watch.⁴ In a New York case, an entry by a deceased attorney in his register of the issuance of an execution was held competent. A valuable case on the subject under discussion is *Lassone v. Boston, etc., R. Co.*⁵ In that case it was a disputed question as to whether the plaintiff's buggy actually came in contact with the defendant's locomotive. The plaintiff introduced some evidence of the character of the injury to his buggy, and it was held that he was then

N. H. 355; *Lassone v. Boston, etc., Co.*, 66 N. H. 345, 24 Atl. Rep. 902; *Merrill v. The Ithaca, etc., R. Co.*, 16 Wend. 586, 30 Am. Dec. 130; *Leland v. Cameron*, 31 N. Y. 115; *Livingstone v. Arnoux*, 56 N. Y. 507; *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; *Nourse v. McCay*, 2 Rawle 70; *Poole v. Dicas*, 1 Bing. N. C. 649; *Bay v. Cook*, 22 N. J. L. 343; *Dow v. Sawyer*, 29 Me. 117; *Culver v. Marks*, 122 Ind. 554, 23 N. E. Rep. 1086, 17 Am. St. Rep. 377.
¹ *Higham v. Ridgway*, 10 East 109.
² *Augusta v. Windsor*, 19 Me. 317.
³ *State v. Phair*, 48 Vt. 366.
⁴ *Leland v. Cameron*, 31 N. Y. 115.
⁵ *Lassone v. Boston, etc., R. Co.*, 66 N. H. 345, 24 Atl. Rep. 902.

entitled to call the administrator of a deceased wagon-maker, whom the evidence showed had repaired the wagon, and to prove the following charge against the plaintiff: "June 8, 1887. To sixteen spokes, 20 cents apiece, \$3.20."

§ 163. Declarant must have been immediately and personally cognizant of fact.—In discussing declarations against interest, it has already been said, that it need not be shown that the declarant had knowledge of the matter whereof he spoke at the time of the declaration, because the presumption would be that a person would not make a declaration against interest unless he was prompted to do so by a knowledge of its truth. It is obvious, however, that if what may be termed the modern doctrine, that entries made by deceased persons in the usual course of business may be admissible, although not made against interest, be accepted, this presumption in such a case is removed, and it ought therefore to be shown that the declarant had immediate and personal cognizance of the facts stated by him.¹ Within this rule it was held that a report which had been made by a person who was dead, as to the amount of damage to certain goods, while acting as appraiser for an insurance company, which had written insurance thereon, was not evidence in a suit against the steamship company which was carrying the goods at the time of the injury. The court put its ruling on the ground that while damage is a fact, yet it can not be *observed* by mathematical calculation, but is an opinion. "An opinion upon such a question," the court said, "however honestly formed, and by however competent a man, is too remote from the indisputable *data* of the senses to be admitted without being subjected to cross-examination."² So a declaration made in a lodge record, by a deceased secretary, as to the age of a member is not evidence as to the latter's age.³

¹ *Bradford v. Cunard S. S. Co.*, 147 Mass. 55, 16 N. E. Rep. 719; *White v. Chouteau*, 1 E. D. Smith 493; *Humes v. O'Bryan*, 74 Ala. 64; *County of Mahaska v. Ingalls*, 16 Iowa 81.

² *Bradford v. Cunard S. S. Co.*, 147 Mass. 55, 16 N. E. Rep. 719.

³ *Conn. Life Ins. Co. v. Schwenk*, 94 U. S. 593. See *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. Rep. 779.

§ 164. **Evidence aliunde position of declarant.**—As in every case where a person seeks to introduce a declaration which is only admissible under particular circumstances, the competency of the declaration can not be shown by the declaration itself. It therefore follows that, if the fact has not been incidentally shown before, there must be proof *aliunde* of the facts necessary to render the declaration competent before it can be introduced.¹

§ 165. **Evidence competent although there are living witnesses.**—The fact that there are persons living who are cognizant of the matter sought to be proved by the declaration will not render it incompetent.²

§ 166. **Admissibility of entry where declarant can testify.**—An entry made in the usual course of business is not admissible as proof of a collateral fact where the declarant is present, because his testimony is the best evidence. A resort to the book can not be justified, unless it is made necessary by the evidence of the witness that he does not remember the transaction.³ In such a case the entry is admissible, as secondary evidence, if the witness is able to depose as to its correctness.⁴ It is not to be denied, however, that the tendency of more recent decisions favors the receiving of the entry as a circumstance corroborative of the testimony of the witness concerning it.⁵

§ 167. **Must be ante litem motam and declarant disinterested in collateral controversy.**—We have seen that modern authority justifies the proposition that the entry need not be against interest to authorize its introduction, but it can be gathered

¹ 1 Greenl. on Ev., § 149; Whart. on Ev., § 233.

² Middleton v. Melton, 10 B. & C. 317; 1 Starkie on Ev., star p. 308.

³ Pittsburg, etc., R. Co. v. Noel, 77 Ind. 110; 1 Phil. on Ev., 389, (1849 ed.).

⁴ Pittsburg, etc., R. Co. v. Noel, *supra*; *post*, § 186.

⁵ Donovan v. Boston, etc., R. Co., 158 Mass. 450, 33 N. E. Rep. 583; Spann v. Bartzell, 1 Fla. 301, 46 Am. Dec. 346, and see Beedy v. Macomber, 47 Me. 451; Blattner v. Weis, 19 Me. 245.

from the authorities, more often by implication than by actual ruling, that the declaration must be made under circumstances which practically preclude the idea that it might have been designed to affect the controversy in which it is sought to be used.¹

§ 168. When entry must be made.—It has been expressly ruled that there need not be proof of the time when the entry was made to render it admissible;² in this respect the rule seems to be somewhat different from the rule with reference to shop-books. But, nevertheless, the theory of the law is that the entry was a practically contemporaneous record of the fact,³ and if the evidence destroys this *a priori* assumption, no doubt the entry is rendered incompetent.

§ 169. Such declarations may be oral.—The cases concerning declarations in the course of business were for many years uniformly cases involving written declarations, so that it came to be a question whether such a declaration could be received if it was oral. The law may now be regarded as reasonably settled in favor of the affirmative of this proposition;⁴ although there is a Massachusetts authority to the contrary.⁵

§ 170. Declarations of deceased officials.—It is not the purpose to treat of that class of official declarations which the law contemplates shall be made for the express purpose of establishing a fact concerning the subject-matter of such declarations. These are, of course, evidence. We have now to deal with official declarations as evidence in collateral controversies, because made in the course of official business. The English cases which have been made the basis of the departure

¹ *County of Mahaska v. Ingalls*, 16 Iowa 81; *Gilchrist v. Martin*, 1 Bailey's Eq., (S. Car.) 492.

² *Doe v. Turford*, 3 Barn. & Adol. 890; *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. Rep. 415.

³ *Barber's Admr. v. Bennett*, 58 Vt. 476, 4 Atl. Rep. 231, 56 Am. Rep. 565.

⁴ *Best on Ev.*, § 502; *Taylor on Ev.*, § 672; note to *Higham v. Ridgway*, as reported in *Smith's Lead Cases*.

⁵ *Framingham Mfg. Co. v. Barnard*, 2 Pick. 532; *Lawrence v. Kimball*, 1 Met. 524.

of the American courts in favor of admitting declarations made in the usual course of business, as a reading of the preceding pages will show, were confined to entries made in the usual course of business, either by officials or quasi-officials or professional persons. This distinction between business entries and professional and official entries has been practically broken down in America. But as to official entries made by deceased persons, it may be claimed for them that they are entitled to more consideration than business entries, because, as to the former, the maxim "*omnia præsumuntur rite esse acta*" obtains with greater force. In this connection, the following remarks from Justice Story, in holding competent an entry of notice to an indorser, made by a deceased notary in his record book, may be quoted as applicable to all declarations made in the usual course of business: "It is the best evidence that the nature of the case admits of. If the party is dead, we can not have his personal examination on oath, and the question then arises whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence can not guard against the effects of human mortality."¹ Upon this ground the cases rest which permit the declarations of deceased surveyors as to boundaries, made in the usual course of their business, to go in evidence.² Of the admissibility of the field notes of a surveyor who is deceased, there can be no question.³ Official and church registers of births, marriages and burials may be competent evidence, particularly when they relate to past generations.⁴ All of these cases have for their foundation the fact that the entry was made in the usual course of business by a person deceased,

¹ And see, also, as to Notaries, *Halliday v. Martinet*, 20 John. 168, 11 Am. Dec. 262; *Wilbur v. Seldon*, 6 Cow. (N. Y.) 62; *Butler v. Wright*, 2 Wend. 369; *Nichols v. Goldsmith*, 7 Wend. 160; *Bell v. Perkins, Peck* (Tenn.) 261, 14 Am. Dec. 745; *Farmers' Bank v. Whitehall*, 16 Serg. & R. 89; *Nourse v. McCay*, 2 Rawle 70.

² *McCormick v. Barnum*, 10 Wend. 104; *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569; *George v. Thomas*, 16 Tex. 74, 67 Am. Dec. 612, note; *Whart. on Ev.*, § 248.

³ *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. Rep. 376; *Snively v. McPherson*, 5 Har. & John. 150; *Richardson v. Carey*, 2 Rand. (Va.) 87.

⁴ *Jackson v. King*, 5 Cowen 237, 15 Am. Dec. 468.

and the reader is therefore referred to the preceding discussion of that subject.

§ 171. **Declarations of deceased persons as to boundaries.**—The authorities upon this subject are in a state of great confusion. This is due in part to the fact that many courts have confused reputation and declarations, as evidence of boundaries. The former subject we have already discussed,¹ and, as was there shown, well considered cases reject evidence of reputation to establish boundaries, except where they are public or *quasi*-public. The reason for this is obvious. If the question be: shall the court permit the declaration of a deceased person, whom the evidence shows was familiar with the boundary, to go in evidence, then it is plain that whatever the objections may be to permitting his declaration to be introduced, it can not be urged that he did not have knowledge. But on the other hand, if it is proposed to receive evidence of reputation—which is drawn from the community at large—the insuperable objection to such a proposal is that there is not even room for a just presumption that the community was informed about what was a mere matter of private concern. Upon the former question it must be admitted that even the conservative judicial opinion of America has pressed the law beyond the confines of English doctrine. “But,” as said by Messrs. Cowen and Hill in their notes to Phillips on Evidence,² “in settling the litigated boundaries of corporeal property, no courts have, probably, been more extensively engaged, or upon questions of greater difficulty, than the American. In conducting the inquiry, therefore, how far can hearsay be brought to bear on the boundaries of private property, while the English decisions are doubtless, as usual, very high evidence of the common law, yet American courts ought not hastily to be condemned, though they may appear to have gone beyond them.” “This,” says the Texas Supreme Court,³ “has been the result of necessity. Our land-marks are usually of perishable materials, and

¹ *Ante*, §§ 130, 139.

² *Stroud v. Springfield*, 28 Tex. 649.

³ Phillips Ev., Vol. 3, (1849 ed.) 241.

by the settlement and improvement of the country, and from other causes, they are constantly being destroyed." But we can not acquiesce in the conclusion of that court that necessity will justify the reception of mere reputation. There is a line of cases in this country that authorizes the introduction of the declarations of deceased persons as to boundaries, while in possession of land owned by them, in the act of pointing out their boundaries, and at a time when they had no reason to deceive or misrepresent.¹ There are also cases which hold that such declarations are competent although made while off the land and not accompanying an act of pointing out the boundaries. The first line of cases has the preponderant voice, but it is to be observed that the effort of the leading case of *Long v. Colton*,² to establish the limitation that the declaration must be made while pointing out the lines, on the ground that such declaration is a part of an act and therefore *res gestæ*, was futile, for the reason that if the declaration is *res gestæ*, it could be proved, although the owner was alive and seeking to introduce it in his own favor. None of the cases go that far. A study of them will show that the declarations of deceased owners are admitted upon a principle analagous to that of declarations concerning pedigree, and the only question is, at what point shall a stopping place be established?³

§ 172. Indorsements of payment—Do they toll the statute of limitations?—Suppose that in a suit upon a specialty or note,

¹ *Hunnicut v. Peyton*, 102 U. S. 333; *N. H.* 532, 15 *Atl. Rep.* 543; *Mutter v. Daggett v. Shaw*, 5 *Met. (Mass.)* 223; *Tucker (N. H.)*, 30 *Atl. Rep.* 352; *Bartlett v. Emerson*, 7 *Gray* 174; *Bartlett v. Brookhouse*, 7 *Gray* 454; *Long v. Colton*, 116 *Mass.* 414; *Curtis v. Aaronson*, 49 *N. J. L.* 68, 7 *Atl. Rep.* 886, 60 *Am. Rep.* 584; *Bender v. Pitzer*, 27 *Pa. St.* 333; *Royal v. Chandler*, 81 *Me.* 118, 21 *Atl. Rep.* 842.

² *Long v. Colton*, 116 *Mass.* 414. *Great Falls Co. v. Worster*, 15 *N. H.* 412; *Adams v. Blodgett*, 47 *N. H.* 219, 90 *Am. Dec.* 569; *Smith v. Forest*, 49 *N. H.* 230; *Lawrence v. Tennant*, 64 *N. H.* 532, 15 *Atl. Rep.* 543; *Mutter v. Tucker (N. H.)*, 30 *Atl. Rep.* 352; *Powers v. Silsby*, 41 *Vt.* 288; *Coate v. Speer*, 3 *McCord (S. Car.)* 227, 15 *Am. Dec.* 627, note.

³ See further on the general subject, *Boardman v. Peed's Lessees*, 6 *Pet.* 327; *Redding's Lessees v. McCubbin*, 1 *Har. & McHen.* 368; *Blythe v. Sutherland*, 3 *McCord (S. Car.)* 258; *Beard's Lessee v. Talbot*, 1 *Cooke (Tenn.)* 142; *Conn v. Pennsylvania*, 1 *Pet. C. C.* 496.

where the statute of limitations is pleaded, it appears that the statute had run except for what purports to be an indorsement of payment, which bears a date prior to the expiration of the period of limitation. Would such indorsement be evidence in favor of the holder without further proof, the person who held the obligation at the date on which the indorsement purports to have been made being dead? The imperfectly reported case of *Searle v. Barrington*,¹ has been cited in support of this proposition,² and in *Smith v. Battey*,³ the proposition was decided in the affirmative. It has been claimed, however, that in *Searle v. Barrington*, there was other evidence as to the date of the indorsement,⁴ and the force of the case is very much shaken by *Rose v. Bryant*,⁵ in which Lord Ellenborough said: "I think that you must prove that these indorsements were on the bond at or recently after the times when they bear date, before you are entitled to read them. Although it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements were receivable whensoever they might have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment." It would seem that *Searle v. Barrington*,⁶ as subsequently interpreted, declares the true rule, for if it was shown by the evidence, *de hors* the declaration, that the indorsement was made while the courts were still open to the holder of the obligation, it must be that a declaration made at that time would be against interest. Professor Parsons suggests as an objection to this view "that an entry while the note is still enforceable, but near the period of limitation, is almost as much in favor of the creditor, and almost as likely to be made in fraud as one made

¹ *Searle v. Barrington*, 2 Stra. 826, 8 Cr. & M. 410, and see 3 Brown P. C. Mod. 278; 3 Brown P. C. 535.

² *Smith v. Battens*, 1 M. & Ro. 341. Glynn v. Bank of England, 2 Ves., See Taylor on Ev., § 695. Senior.

³ *Smith v. Battens*, 1 M. & Ro. 341.

⁵ *Rose v. Bryant*, 2 Camp. 321.

⁴ Bayley, B., in *Gleadow v. Atkin*, 1

⁶ *Searle v. Barrington*. 2 Stra. 826.

a short time later.”¹ This assertion will scarcely bear analysis, however, for in the latter case the purpose which it would be sought to make the indorsement subserve would be to gain a remedy for the balance of the obligation, while in the former case his remedy would exist, and the only possible purpose the entry might serve would be to enable his representatives to wait until the statute of limitations had almost a second time expired, in the hope that the debtor would not then be prepared with evidence of payment. While it is conceded that the indorsement might be made for this very purpose, yet the possibility that the holder of the obligation, conscious that it could be defeated, would make an indorsement upon the obligation, affixing a date just prior to the expiration of the period of limitation, trusting not only that lapse of time might destroy the adverse evidence, but also that his own death might opportunely occur, so as to make his entry competent, is so remote that the law, as a practical science, ought to account such a possibility as *nil*. The conflict which has been waged on this subject was set at rest in England by Lord Tenterden’s act² as to all written obligations, except bonds and other specialties, by providing that such indorsements should not operate to extend the statute. Like legislation is found in some of the states.

Shop-Books as Evidence Between Seller and Purchaser.

§ 173. **Leading case upon shop-books.**—The case most frequently cited on this subject is that of *Price v. Earl of Tarrington*.³ It is as follows: “The plaintiff being a brewer, brought an action against the Earl of Tarrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff’s dealing was, that the draymen came every night to the clerk of the brew-house and gave him an account of the beer that they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that the drayman was dead, but that

¹ Parson’s Notes and Bills, 663.

² 9 G. 4 c. 14.

³ *Price v. Earl of Tarrington*, Salk. 285, reported in Smith’s Lead. Cas.

this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more." While the English courts have manifested a disposition not to extend the doctrine of this case, yet its authority has never been questioned. It will be observed that it bears this essential difference from a class of cases we have lately been discussing: that the evidence was admitted only as proof between the seller and the buyer; in discussing the subject of entries in the usual course of business, as proof in collateral controversies, we have seen that in England, at least, the authorities can not be said to go further than to admit an entry which is not against interest where it is made in the usual course of business of official or professional employment. We see, however, in *Price v. Tarrington*,¹ that as between seller and buyer a mere *business* entry, not against interest, is admitted.

§ 174. *Shop-books in United States.*—It is not probable that any American court would hold that *Price v. Tarrington*² was decided wrong, in fact in most of the states the courts have gone considerably beyond that case, in this: that they admit shop-books, even where the clerk is living, provided that they are accompanied by his suppletory oath, where it can be procured, and in many of the states, the plaintiff being a competent witness, even his own entries are received under the same limitation. But evolutionary processes go on even in the law of evidence, and the American courts, in extending the English doctrine upon the subject under discussion, have only yielded to the imperative demand of a commercial age. Fortunately, however, this innovation upon the English law is not an excrescence upon the law of evidence, for it is approximately the law concerning the *res gestæ*, a doctrine which has also developed within the last century. If goods are purchased on credit, it may be said, with practical accuracy, that in the business world a charge is a necessary concomitant. Now, if this charge be entered at a time substantially contemporaneous

¹ *Price v. Earl of Tarrington*, Salk. 285.

² *Price v. Earl of Tarrington*, Salk. 285.

with the extension of the credit, it may be said that the charge is a part of the *res gestæ*. Of course it will not do to attempt to tie the doctrine of the admissibility of shop-books down to the doctrine of *res gestæ*, for that would lead to error in respect to the element of contemporaneousness, but the analogy is sufficiently strong, and the necessity sufficiently great, to pretty thoroughly intrench the modern cases relative to the admissibility of merchants' books.

§ 175. **Character of transactions upon which books may be introduced.**—The innovation of permitting books to go in evidence in inquiries as to transactions between buyer and seller has not been accomplished by the influence of some masterful precedent, the logic of which settled the law and the practice upon the subject. But we find instead, in each state where the innovation has been judicially sanctioned, that an independence of spirit has been manifested which has made the decisions, viewed as a whole, somewhat heterogeneous. There are some states in which the doctrine has never been carried beyond *Price v. Tarrington*,¹ in which the necessity for the introduction of the books was absolute. In other states the courts have manifested a disposition to admit entries made in the usual course of business, when accompanied with a suppletory oath, although no absolute necessity exists. Between these extremes there are various shades of doctrine. In the main, however, the courts have kept quite close to *Price v. Tarrington*,² in the disposition to confine evidence of book entries to such as are made in the regular books used by persons in their business, and to such entries as relate to such business, and not to permit such entries to evidence anything but the sale and delivery of goods or the rendition of services. As we shall see hereafter, a mere private memorandum is not evidence, except under exceptional circumstances.³

¹ *Price v. Earl of Tarrington*, Salk. 285.

² *Price v. Earl of Tarrington*, Salk. 285.

³ *Post*, § 186.

§ 176. **To what classes of business the doctrine applies.**—According to the current of authority at this time, the doctrine is not confined to shop-books. The majority of the cases upon the subject sanctions the use of book entries to evidence the sale and delivery of goods, or the performance of service.¹ In a South Carolina case,² where the books of a billiard table keeper were offered to prove an assumpsit for the use of the table, the judge who wrote the opinion of the court said: “The plaintiff in this action is not a shop-keeper, merchant, handicraftsman or mechanic, nor can the case be brought within the description of any of those in which books of entries have been allowed. The action is not for articles of any kind sold or delivered, service rendered, or for work or labor, and if these books are to be allowed, I do not see why the books of showmen, rope-dancers, and gamblers of every description may not be admitted.”³

§ 177. **Transaction must be within scope of ordinary business.**—Books can not be used to prove transactions isolated from the party's regular business. Thus it has been held, where a person was not engaged in the selling of horses, that an entry in his books showing the sale of a horse was not competent.⁴ So, in a case where a person claimed to have sold his

¹ See *Charlton v. Lowry*, Mart. (N. Car.) 26; *Mitchell v. Clark*, Mart. (N. Car.) 25; *Sargeant v. Pettibone*, 1 Aik. (Vt.) 355; *Fry v. Slyfield*, 3 Vt. 246; *Howell v. Barden*, 3 Dev. (N. Car.) 442; *Easly v. Eakin*, Cooke's Rep. (Tenn.) 295; *Phenix v. Prindle*, Kirby (Conn.) 207; *Boardman v. Keeler*, 2 Vt. 65. The decided preponderance of authority is in favor of the proposition that charges on account of money loaned, or paid at the request of the other party, can not be proved. *Inslee v. Prall*, 3 Zab. (N. J. L.) 457; *Bailey v. McDowell*, 1 Harr. (Del.) 346; *Peck v. Von Keller*, 76 N. Y. 604; *Sanford v. Miller*, 19 Ill. App. 536. *Contra*, *Warden v. Johnson*, 11 Vt. 455. It was held that such entries were ad-

missible in *Orcutt v. Hanson*, 70 Iowa 604, 31 N. W. Rep. 950, where the plaintiff was engaged in the business of loaning money. In a number of the states cash entries as evidence is a subject of statutory regulation.

² *Boyd v. Ladson*, 4 McCord (S. Car.) 76, 17 Am. Dec. 707.

³ In this case, the case of *Frazier v. Drayton*, 2 Nott. & McCord 471, where it was held that the books of a ferryman were admissible to prove an account for ferriage, is criticized for the reason that it is not the habit of ferrymen to give credit.

⁴ *Shoemaker v. Kellog*, 11 Pa. St. 300. See *Corr v. Sellers*, 100 Pa. St. 169, 45 Am. Rep. 370; *Smith v. Law*, 47 Conn. 431; *Veiths v. Hagge*, 8 Iowa 163;

interest in certain property, a book was excluded which contained the single entry, "To 1,079 head at 30 cents per head."¹ Entries of cash advances in a merchant's book have been rejected on the same ground.²

§ 178. **To what subject entry must relate.**—As already stated, the cases confine book entries to cases where they tend to prove the sale and delivery of goods or the rendition of some kind of service. They can not be used to prove facts that are collateral thereto, as, for instance, that the defendants were partners;³ that a mistake existed in a former settlement;⁴ or to prove a balance struck on book accounts,⁵ or to whom credit was given, where that fact is in issue.⁶ Books can not be used as negative evidence, as where a defendant seeks to show that there is nothing on his books relative to the claim plaintiff is asserting.⁷

§ 179. **Relation of entry to transaction.**—There must be a right to charge when the service is done or the goods delivered,⁸ and the circumstances must be such that there is a trust implied that the book shall be kept for the benefit of the person performing the service or selling the goods.⁹ The transaction must be of such a character that it is the just expectation that the charge is to accompany the rendering of the service or the furnishing of the goods.¹⁰ On this ground it has been held that books could not be used in an action for part performance under a special contract, or for goods which were to

Moody v. Roberts, 41 Miss. 74; Baldridge v. Penland, 68 Tex. 441, 4 S. W. Rep. 565.

¹ Ryan v. Dunphy, 4 Mont. 356, 47 Am. Rep. 355. See Corr v. Sellers, 100 Pa. St. 169, 45 Am. Rep. 370.

² Young v. Jones, 8 Iowa 219; Case v. Potter, 8 Johns. 211; Low v. Payne, 4 N. Y. 247; Maine v. Harper, 4 Allen 115.

³ Severance v. Lombardo, 17 Cal. 57.

⁴ Punderson v. Shaw, Kirby (Conn.) 150; Rogers v. Moor, 2 Root 58.

⁵ Prest v. Mercereau, 4 Halst. 268.

⁶ Kaiser v. Alexander, 144 Mass. 71, 12 N. E. Rep. 209.

⁷ Mattocks v. Lyman, 18 Vt. 98, 46 Am. Dec. 138.

⁸ Work and labor must in general be executed before it is charged. Howell v. Barden, 3 Dev. 442. But see Kaughley v. Brewer, 16 S. & R. 133, 16 Am. Dec. 554.

⁹ Merrill v. Ithaca, etc., R., 16 Wend. 586, 30 Am. Dec. 130; Terrill v. Beecher, 9 Conn. 344.

¹⁰ Alexander v. Hoffman, 5 W. & S. 382; Eshleman v. Harnish, 76 Pa. St. 97.

be delivered at a future day.¹ The invoice book of an agent is not evidence of the sale and delivery of goods.²

§ 180. **Character of entry.**—It is an inflexible requirement that the entry offered shall be the first permanent memorial of the transaction. But it has been held that a day-book was a book of original entries, although a primary entry had been made on a slate,³ or upon a butcher's cart;⁴ and a like ruling was made in a case where the plaintiff kept an account in a book, made up from marks upon his wagon indicating the number of loads of dirt hauled by him.⁵ In cases like these it is necessary to prove that the transfer to the permanent record was made with reasonable promptitude.⁶ The cases are not uniform as to the exact time; a very considerable delay was held not to exclude the book in one case⁷ and in another the idea is suggested that the delay may be explained.⁸ The governing principle is not difficult to ascertain, however. The reason why the law permits the permanent memorial to be introduced, notwithstanding the temporary entry, is that the former alone is the one which the parties have impliedly agreed shall be an evidence of the transaction. The case, therefore, stands as though no temporary memorandum had been made. With respect to the time of entering the charge, whether there has been a preceding minute of the transaction or not, it may be said that while the law does not fix the precise time when

¹ Rheem v. Snodgrass, 2 Grant (Pa.) 649; Landis v. Turner, 14 Cal. 573; Forsythe v. Norcross, 5 Watts 432, 30

² Cooper v. Morrel, 4 Yeates 341. Am. Dec. 334. See Miller v. Shay,

³ Faxon v. Hollis, 13 Mass. 427; 145 Mass. 162, 13 N. E. Rep. 468, 1 Whitney v. Sawyer, 11 Gray 242; Landis v. Turner, 14 Cal. 573; Sickles v. Mather, 20 Wend. 72, 32 Am. Dec. 521; Faxon v. Hollis, 13 Mass. 427; Woolsey v. Bohn, 41 Minn. 235, 42 N. W. Rep. 1022; Hall v. Glidden, 39 Me. 445.

⁴ Smith v. Sanford, 12 Pick. 139, 22 Am. Dec. 415. ⁷ Hall v. Glidden, 39 Me. 445.

⁵ Miller v. Shay, 145 Mass. 162, 13 N. E. Rep. 468, 1 Am. St. Rep. 449. ⁸ Landis v. Turner, 14 Cal. 573. Ex-

⁶ Drummond v. Hyams, Harper's (S. Car.) Law Rep. 268, 18 Am. Dec. 649. examine Drummond v. Hyams, Harper's (S. Car.) Law Rep. 268, 18 Am. Dec. 649.

the charge must be made,¹ and literal contemporaneousness is not required, yet it must appear, from evidence of business custom, or otherwise, that the entry was a substantially contemporaneous record of the transaction. Mr. Wharton's statement of the law on this subject is that "the entries must be made as soon after the transaction as is consistent with the due course of business."² The charge must be reasonably specific, for the reason that the book is *prima facie* evidence of the item charged and the price or value carried out.³ The following entries have been rejected as too indefinite: "One hundred and ninety days' work;"⁴ "Seven gold watches, \$308;"⁵ "To repairing brick machine;"⁶ "\$13 for medicine and attendance on one of the General's daughters in curing the whooping cough."⁷ No particular form of book-keeping is required. If a merchant's original entries are put down in ledger form, that affords no reason for excluding the book.⁸ It is competent to explain such characters in the entry as are in common use in the particular line of business, and which would be readily understood by persons conversant with its terms, but with this exception the suppletory oath can not go to the extent of explaining the item offered.⁹ In order to be competent the book which is offered must be that in which the party was in the habit at the time of recording the transactions of the line of

¹ *Curren v. Crawford*, 4 S. & R. (Pa.) 3.

² *Ev.*, § 683. See *Walter v. Bollman*, 8 Watts 544; *Kent v. Garvin*, 1 Gray 148; *Taggart v. Fox*, 11 Daly 159. In *Jones v. Long*, 3 Watts 325, it was said by Sergeant, J.: "The entry need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived, unimpaired. The law fixes no precise instant when the entry should be made. If done at or about the time of the transaction it is sufficient."

³ *Corr v. Sellers*, 100 Pa. St. 169, 45 Am. Rep. 370.

⁴ *Lynch's Admr. v. Petrie*, 1 Nott. & McCord 130.

⁵ *Bustin v. Rogers*, 11 Cush. 346.

⁶ *Corr v. Sellers*, 100 Pa. St. 169, 45 Am. Rep. 370.

⁷ *Hughes v. Hampton*, 2 Const. Rep. 745.

⁸ *Faxon v. Hollis*, 13 Mass. 427; *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501. The fact that a ledger is not a book of original entries operates to exclude it where not so used. *Griesheimer v. Tanenbaum*, 124 N. Y. 650, 26 N. E. Rep. 957.

⁹ *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501.

business to which the entry pertains, and there must be nothing about the entry, or indeed about the book generally, which is calculated to infect the entry in question with suspicion.¹ Slight circumstances will suffice to destroy the competency of book entries, as it is a class of evidence which stands on the verge of incompetency, and entries may be excluded where there are interlineations, erasures and impossible dates in connection with the entries in question which justly subject them to suspicion.² "The question of competency," says the court in a Mississippi case,³ "must be determined by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his employment, the manner of his charges against other people, and all the circumstances of the case." While the trial court should be quick to seize upon circumstances which discredit entries, yet the court ought to exercise a keen discrimination to avoid the exclusion of entries which in their very mistakes show the artlessness of the undersigning.⁴ In some of the states affirmative evidence is required that the party keeps honest books.

§ 181. Question of necessity as affecting right to introduce books.—Upon this point the authorities can not be reconciled. The cases which hold to the doctrine of necessity maintain, where a sale is made of articles of great bulk or weight, that book entries thereof must be excluded, for the reason that there is better evidence of the fact of delivery. So where a service is rendered of a character which presupposes that third persons are informed of it, there are cases which hold the book-entry incompetent. On this ground an entry was held inadmissible which read: "To repairing brick-machine, 1932.76."⁵ In another

¹ *Funk v. Ely*, 45 Pa. St. 444; practice is to submit even suspicious entries to the jury, and allow it to determine what weight, if any, shall be given them. *Wood's Prac. Ev.*, p. 4. *Serg. & R.* 3; *Johnson v. Fry*, 88 Va. 695, 12 S. E. Rep. 973, 14 S. E. Rep. 183.

² See cases in preceding note.

³ *Moody v. Roberts*, 41 Miss. 74.

⁴ *Aik.* 355.

⁵ *Corr v. Sellers*, 100 Pa. St. 169, 45

⁶ In Delaware and Vermont the *Am. Rep.* 379.

case it was held that a school-master's book, although regularly kept, was not evidence, as he must have had many witnesses at his command to prove his service.¹ It is not to be denied, however, that the courts have not kept close to the doctrine of necessity in the United States, for the practice has become quite general to receive book entries, when accompanied by the supplementary oath, without regard to the consideration as to whether there is any person who is a competent witness having a recollection of the transaction. In this class of cases such entries are regarded as original evidence. Thus, in a Massachusetts case,² it is said: "The use of one's own books, verified by his oath, is not secondary evidence, nor is it necessary to its admission first to show the loss of other evidence. It is original, but feeble and unsatisfactory evidence." In a New Hampshire case,³ the court said: "It is the book which is the evidence, and the party testifies in chief only to verify it. The party is not a witness who testifies to facts, and then appeals to the book in corroboration of his story; but the book is the source of information, and the party is limited to testifying that it is a true record."

§ 182. **Party's own entries may be shown.**—The tendency to give credence to contemporaneous business entries has led the courts of the United States, with few exceptions, to admit the entries of parties made under the limitations heretofore stated. The following is from the note of Judge Freeman to the case of *Union Bank v. Knapp*,⁴ as reported in 15 American Decisions 181: "Entries made at the time acts took place, by one whose duty it was to keep a record of such acts, or by the tradesman whose duty it was, in the course of his business dealings, to preserve a minute of them himself, ought equally to be received as evidence of these acts. The mere fact that the accounts in the latter case may be to the interest of the party making them should not of itself cause their rejection. In the former case it is uniformly urged in support of the ad-

¹ *Pelzer v. Cranston*, 2 McCord 328.

² *Little v. Wyatt*, 14 N. H. 23.

³ *Mathes v. Robinson*, 8 Met. 269, 41 Am. Dec. 505.

⁴ *Union Bank v. Knapp*, 3 Pick (Mass.) 96, 15 Am. Dec. 181.

missibility of the book of items that it will be presumed that he who was in duty bound to keep a faithful transcript of events has performed his duty. The presumption drawn from honesty of purpose appears to be just as strong in the latter case, where the merchant writes up his own books of debits and credits, and at least should not be overthrown by the mere appearance of a balance in his favor." The disposition to treat book entries as primary evidence leads to the further ruling, where this view of the law obtains, that the fact that the statute has rendered the party a competent witness will not operate to exclude his book.¹

§ 183. **Suppletory oath.**—The preceding discussion has made it manifest that there must be evidence offered, at least when it can reasonably be obtained, that the conditions exist which render the entry competent. If the sale was by a clerk, he must ordinarily be called to make the suppletory proof. If the clerk is dead or insane his handwriting may be proved. There are authorities which excuse the production of the evidence of the clerk where he is permanently out of the state.²

¹ In *Nichols v. Haynes*, 78 Pa. St. 174, it is said: "Now the party himself is a competent witness, and may prove his own claim as a stranger would have done before the act of 1869. That the facts contained in the book, either of charge or discharge of cash or goods, or whatever else is in his personal knowledge, might be proved by a stranger, no one doubts. A clerk, for instance, could prove the account, including cash items, from his own knowledge, and might use the book to refresh his memory. The party now stands by force of the act on the same plane of competency as the stranger stood upon, and, therefore, may make the same proof that a stranger could."

² *Chaffee v. United States*, 18 Wall. (U. S.) 516; *Burton v. Driggs*, 20 Wall. 134; *Cummings v. Fullam*, 13 Vt. 434;

Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; *Bartholomew v. Farwell*, 41 Conn. 107; *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. Rep. 415; *Sterrett v. Bull*, 1 Binn. (Pa.) 234; *Alter v. Berghaus*, 8 Watts 77; *Hay v. Kramer*, 2 Watts & S. 137; *Culver v. Marks*, 122 Ind. 554, 23 N. E. Rep. 1086, 17 Am. St. Rep. 377; *Elms v. Chevis*, 2 McCord (S. Car.) 349; *Tunn v. Rogers*, 1 Bay 480; *McDonald v. Carnes*, 90 Ala. 147, 7 So. Rep. 919; *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562. In the case last cited it was held that there should be proof that the clerk was not fraudulently sent out of the jurisdiction. In other cases it is held that the fact that the clerk resides out of the state will not excuse the production of his evidence with the books. *Welsh v. Barret*, 15 Mass. 380; *Merrill*

§ 184. **Secondary evidence of books.**—There is an early case in which it was held that extracts from a foreign merchant's book might be received, if verified by the oath of a clerk, the court saying that it would be unreasonable to require the production of the books.¹ It has been held in Idaho that secondary evidence of account books might be introduced upon proof of their loss or destruction.² It would seem, however, that when the books of a party can not be produced it is time to stop. It would be an intolerable practice to permit a party to prepare self-serving declarations in the way of book entries, and then, upon their loss or destruction, to prove them by a class of proof which of necessity excludes from consideration all those tests of truth which lift entries made in the usual course of business above the plane of hearsay. A very forcible opinion upon the subject under consideration is that of Lumpkin, J., in a Georgia case.³ In the case referred to the learned justice says: "So long as the books themselves are required to be produced, the defendant may by their inspection defeat such proofs by showing such a want of fairness and regularity as to create suspicion, or throw discredit upon the account with which he is sought to be charged. But allow the party, in the absence of his books, to establish the demand by a copy claimed to have been drawn or transcribed by himself, and what protection has the defendant? Is he not delivered over, bound hand and foot, to his adversary? Better that the debt be lost for want of sufficient testimony, as many rights are, than to establish a principle and practice so fraught

v. Ithaca, etc., R. Co., 16 Wend. 536; 30 Am. Dec. 130; *Brewster v. Doan*, 2 Hill 537; *Mahaska County v. Ingalls*, 16 Iowa 81. The general argument advanced in the cases last cited is that as the clerk's evidence can be procured, it would be to incur an unnecessary danger to dispense with his evidence, since it might lead to fraud and there would be no such responsibility for false entries as there would be if he testified under oath. As to insanity see *Mc-*

Donald v. Carnes, 90 Ala. 147, 7 So. Rep. 919; *Chaffee v. United States*, 18 Wall. 516; *Holbrook v. Gay*, 6 Cush. 215; *Mahaska County v. Ingalls*, 16 Iowa 81.

¹ *Bell v. Keely*, 2 Yeates (Pa.) 255. See *Lewis v. Bacon*, 3 Hen. & Munf. 89; *Elms v. Chevis*, 2 McCord 349.

² *Mills v. Glennon*, 2 Idaho 95, 6 Pac. Rep. 116.

³ *Creamer v. Shannon*, 17 Ga. 65, 63 Am. Dec. 226.

with mischief." The following is an extract from the opinion of the court in a Pennsylvania case:¹ "The rule that makes shop-books evidence is founded in the necessities of justice. They are evidence manufactured by the shop-keeper himself, for his own purposes, and without any chance of supervision by the customer. In their best estate, therefore, it is proper to subject them, when offered in evidence, to severe scrutiny."

§ 185. **Books of deceased persons.**—The extension of the doctrine concerning the admissibility of entries made by the party himself, leads, in principle, to the doctrine that upon his decease his books, if competent while he was in life, are still admissible. This is the prevailing view.² There seems to be some difference of opinion as to the character of the suppletory proof which should be made in such cases. It would seem, however, if the executor or administrator testifies that the books came into his possession as the books of the deceased, and, if proof is made of his handwriting, that further testimony should not be required, to render the books *prima facie* competent.³

§ 186. **Mere memoranda not evidence.**—Mere private memoranda is not ordinarily competent, even where their correctness is testified to,⁴ but under exceptional circumstances such

¹ *Weamer v. Juart*, 29 Pa. St. 257, 72 Am. Dec. 627.

² *Bentley's Admr., v. Hollenbeck*, Wright's Rep. (Ohio) 168; *Prince v. Smith*, 4 Mass. 455; *Pratt v. White*, 132 Mass. 477; *Dwight v. Brown*, 9 Conn. 83; *McLellan v. Crofton*, 6 Greenl. 307; *Dodge v. Morse*, 3 N. H. 232; *Hoover v. Gehr*, 62 Pa. St. 136; *Howard v. Patrick*, 38 Mich. 795; *Martin v. Scott*, 12 Neb. 42, 10 N. W. Rep. 532. Examine *Mason v. Wedderspoon*, 43 Hun 20; *Bland v. Warren*, 65 N. Car. 372; *Treadway v. Treadway*, 5 Ill. App. 478. In *Holbrook v. Gay*, 6 Cush. (Mass.) 215, the doctrine of the text was extended to a case where the

seller had become insane. A different doctrine obtains where the book is a mere diary or personal memoranda. *Costello v. Crowell*, 139 Mass. 588, 2 N. E. Rep. 698; *post*, § 186.

³ *Hoover v. Gehr*, 62 Pa. St. 136. See *Bentley's Admr. v. Hollenbeck*, Wright's Rep. (Ohio) 168.

⁴ *Watt v. Howard*, 7 Met. 478; *Costello v. Crowell*, 139 Mass. 588, 2 N. E. Rep. 698; *City of New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. Rep. 905, 55 Am. Rep. 839; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 21 N. E. Rep. 408, 11 Am. St. Rep. 633; *Barber v. Bennett*, 58 Vt. 476, 4 Atl. Rep. 231, 56 Am. Rep.

memoranda may be competent as *res gestæ*.¹ There is a broad distinction between insulated memoranda, not part of the *res gestæ*, and business entries, which are made in pursuance of business obligation and bear on their face a degree of evidence that they are a practically contemporaneous record of transpiring business affairs.² Where, however, a witness testifies that he has no recollection of the facts of a transaction independent of a private memorandum, but is able to state that he knows the entry is correct, because of his invariable custom to make correct entries, or because he recollects making or examining the entry when the facts were fresh in his mind and he recollects that it was correct, such a case is a proper one for the introduction of the memorandum itself.³ It is to be observed that these circumstances warrant the introduction of the entry by reason of the combined facts that without the memorandum the evidence of the witness would go for naught, while, if received, his suppletory oath verifies the memorandum. If he has an independent recollection of the facts, or if an inspection of the memorandum quickens his memory to the point of recollection, the mem-

565; *Barnes v. Dow*, 59 Vt. 530, 10 Atl. Rep. 258; *Lassone v. Boston, etc.*, R. Co., 66 N. H. 345, 24 Atl. Rep. 902.

¹ *Nat. Ulster Co. Bank v. Madden*, 114 N. Y. 280, 21 N. E. Rep. 408, 11 Am. St. Rep. 633; *post*, § 286.

² In *City of New York v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. Rep. 905, 55 Am. Rep. 839, the court said: "We are of opinion, however, that it is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and

not under the sanction of duty or other obligation." A purely private record kept by a locomotive inspector for his own purposes is not evidence. *Hoffman v. Chicago, etc.*, R. Co., 40 Minn. 60, 41 N. W. Rep. 301.

³ *Brown v. Jones*, 46 Barb. 400; *Meacham v. Pell*, 51 Barb. 65; *Nat. Ulster Co. Bank v. Madden*, 114 N. Y. 280, 21 N. E. Rep. 408, 11 Am. St. Rep. 633, and cases cited; *Merrill v. Ithaca, etc.*, R. Co., 16 Wend. 586; 30 Am. Dec. 130; *Lapham v. Kelly*, 35 Vt. 195; *Schettler v. Jones*, 20 Wis. 412; *Curran v. Witter*, 68 Wis. 16, 31 N. W. Rep. 705, 60 Am. Rep. 827; *Butler v. Chicago, etc.*, R. Co., 87 Iowa 206, 54 N. W. Rep. 208; *Insurance Co. v. Weides*, 14 Wall. (U. S.) 375. See *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. Rep. 277.

orandum is incompetent, because there is better evidence of the facts, while if his oath is lacking, the memorandum has nothing to lift it above its hearsay plane.¹

Depositions in Perpetuam Memoriam.

§ 187. **Bills to perpetuate testimony.**—Courts of chancery exercise a jurisdiction to perpetuate testimony, where the fact which it is desired to obtain testimony concerning can not be immediately investigated at law, as, for example, where the party filing the bill has merely a future interest, or, having an immediate interest, is himself in possession and not actually disturbed, though threatened by the defendant with a disturbance at a future time.² In most of the states this subject is regulated by statute.

Testimony of Witness Given Upon Former Trial.

§ 188. **Testimony on former trial, when admissible.**—The testimony of a witness upon a former trial is secondary evidence. Our present concern is to ascertain the exceptional circumstances which will warrant its introduction. While the law does not require that the former action should be the same as that which is upon trial, yet it is essential that the witness should have deposed as to the same subject-matter, and that the issue upon the former trial should have been of

¹ Although entries by deceased persons in the regular course of business are competent, as shown in earlier portions of this chapter, yet the death of the maker will not render a mere private memorandum competent. *Lassone v. Boston, etc., R. Co.*, 66 N. H. 345, 24 Atl. Rep. 902; *Barber v. Bennett*, 58 Vt. 476, 4 Atl. Rep. 231; 56 Am. Rep. 565; *Costello v. Crowell*, 139 Mass. 588, 2 N. E. Rep. 698.

² *Adams Eq.*, star p. 23. Courts of chancery also entertain jurisdiction of bills for leave to take the depositions of witnesses *de bene esse*; that is,

where suit is pending, and the regular opportunity for taking depositions has not arrived, because the cause is not at issue. Some special reason ought to exist for the taking of the testimony in advance, as the fact that the witness is aged, sick, or the only witness upon an important point. Courts of chancery issue commissions to examine witnesses abroad. This jurisdiction originated in the incapacity of courts of law to issue such commissions without the consent of the parties.

such a character as to challenge a full cross-examination respecting the right asserted in the subsequent case. Thus, where the issue raised in the former action was as to the existence of a common or free fishery, it was held that the testimony of a witness examined in that case, and who had subsequently deceased, was not admissible in an action where a several right of fishery was asserted.¹ Professor Greenleaf correctly remarks that the admissibility of this class of evidence "seems to turn rather on the right to cross-examine than upon the precise nominal identity of all the parties." Within the limitations above stated, the cases agree that the testimony of a witness upon a former trial may be introduced if such witness is dead.² The authorities agree that such evidence is also admissible in all cases where the witness is to all intents dead for the purposes of evidence—as where the witness is insane,³ or has become disqualified. At common law the former testimony of a witness was competent if he was beyond seas. The authorities in this country in the main hold that such testimony may be introduced if the witness is permanently or indefinitely absent from the state.⁴ There are, however, a number of authorities to the contrary.⁵ These authorities proceed upon the theory that if the witness's residence is known, due diligence requires the taking of his deposition. Preference

¹ *Melvin v. Whiting*, 7 Pick. 79.

² 1 Greenl. on Ev., § 164.

³ *Ruch v. Rock Island*, 97 U. S. 693; *Insurance Co. v. Weide*, 9 Wall. (U. S.) 677; *Halsey v. Sinebaugh*, 15 N. Y. 485; *Calvert v. Cox*, 1 Gill 95; *Thompson v. State*, 106 Ala. 67, 17 So. Rep. 512; *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *Sage v. State*, 127 Ind. 15, 26 N. E. Rep. 667; *Bass v. State*, 136 Ind. 165, 36 N. E. Rep. 124; *Chicago, etc., R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. Rep. 263.

⁴ *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *Thompson v. State*, 106 Ala. 67, 17 So. Rep. 512; *Emig v. Diehl*, 76 Pa. St. 359.

⁵ *Lowe v. State*, 86 Ala. 47, 5 So.

Rep. 435; *Perry v. State*, 78 Ala. 22, 6 So. Rep. 425; *Thompson v. State*, 106 Ala. 67, 17 So. Rep. 512; *State v. Riley*, 42 La. Ann. 995, 8 So. Rep. 469; *Magill v. Kauffman*, 4 S. & R. 317, 8 Am. Dec. 713; *Howard v. Patrick*, 38 Mich. 795; *Sneed v. State*, 47 Ark. 180, 1 S. W. Rep. 68; *People v. Devine*, 45 Cal. 46; *Omaha Street R. Co. v. Elkins*, 39 Neb. 480, 58 N. W. Rep. 164.

⁶ *Wilbur v. Selden*, 6 Cow. (N. Y.) 162; *Berney v. Mitchell*, 34 N. J. L. 337; *Hobson v. Doe*, 2 Blackf. (Ind.) 308; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Wilder v. City of St. Paul*, 12 Minn. 192; *Gerhauser v. North British, etc., Insurance Co.*, 7 Nev. 174.

must be given to the former line of cases, as absence from the state is the practical equivalent of beyond seas.¹ In a Minnesota case² it was held, where the testimony of a witness, who was a non-resident of the state, had been taken upon a former trial by an official shorthand reporter, thereby overcoming the objection that the witness upon the second trial was testifying from memory, that the evidence of the reporter as to the former testimony of the witness was competent. The soundness of this conclusion can scarcely be doubted, as the law ought not to require a party under such circumstances to do the vain act of taking the deposition of the witness. If the whereabouts of a witness can not be ascertained, after diligent inquiry, the case stands, to all intents and purposes, as though the witness were dead.³ To prevent a party from taking advantage of his own wrong, the law is that if by his wrongful contrivance a witness is kept from attending upon court, his former testimony may be used by the opposite party, as in other cases mentioned in this section.⁴ It has been sometimes stated in general terms that the fact that a witness is sick will justify the introduction of his prior testimony, but this statement is too broad.⁵ It has been held that the former testimony of a witness might be used who was so old and bedridden that it appeared that his disability was permanent.⁶ If the sickness is only temporary, the party ought to apply for a postponement of the cause, or, if the statute permits it, and the witness is able, take his deposition.

§ 189. Admissibility in criminal case of testimony given on former trial.—The view is to a considerable extent prevalent that the constitutional guaranty of the right of a person

¹ *Davie v. Briggs*, 97 U. S. 628; *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241.

² *Minneapolis Mill Co. v. Minn., etc., R. Co.*, 51 Minn. 304, 53 N. W. Rep. 639.

³ *Drayton v. Wells*, 1 Nott & McCord 409, 9 Am. Dec. 718; 1 Greenl. on Ev., § 163.

⁴ *Reynolds v. United States*, 98 U. S.

145. See authorities cited in last note.

⁵ *Le Baron v. Crombie*, 14 Mass. 234; *Com. v. Richards*, 18 Pick. (Mass.) 434, 29 Am. Dec. 608; *Com. v. McKenna*, 158 Mass. 207, 33 N. E. Rep. 389; *State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565.

⁶ *Regina v. Wilshaw*, 1 Car. & Marsh. 145.

charged with crime to face his accusers renders evidence of the testimony of a witness upon a former trial incompetent. This view is erroneous. In Cooley's Constitutional Limitations, at page 389, the learned author, in speaking of this constitutional provision, says: "If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there was a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane or sick and unable to testify, or has been summoned, but appears to have been kept away by the opposite party." In a New York case¹ the New York Court of Appeals said: "This constitutional provision was not intended to secure to the accused person the right to be confronted with the witnesses against him upon his final trial, but to protect him against *ex parte* affidavits and depositions taken in his absence, as was frequently the practice in England at an early day. It was never regarded as an invasion of the fundamental rights of an accused person to read depositions upon his trial, if at some stage of his case he could be confronted with and cross-examine the witnesses to be used against him." There is but little dispute upon the proposition that the fact that a witness upon a former trial has deceased will authorize the use of his evidence, even if the case be a criminal one. Many cases go the length of holding that the permanent absence from the state of a witness in a criminal case will make it competent to use his former testimony.² There is even greater necessity for admitting such

¹ *People v. Fish*, 125 N. Y. 136, 26 N. E. Rep. 319. Rep. 202; *State v. Beyers*, 16 Mont. 565, 41 Pac. Rep. 708; *State v. Elliott*, 90 Mo. 350, 2 S. W. Rep. 411.

² To the same effect, *People v. Williams*, 35 Hun 516; *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. Rep. 337; *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *Summons v. State*, 5 Ohio St. 325; *Sage v. State*, 127 Ind. 15, 26 N. E. Rep. 667; *Hair v. State*, 16 Neb. 601, 21 N. W. Rep. 464; *State v. Fitzgerald*, 63 Iowa 288, 19 N. W. Rep. 202; *State v. Beyers*, 16 Mont. 565, 41 Pac. Rep. 708; *State v. Elliott*, 90 Mo. 350, 2 S. W. Rep. 411. ³ *Lowe v. State*, 86 Ala. 47, 5 So. Rep. 435; *Perry v. State*, 78 Ala. 22, 6 So. Rep. 425; *State v. Riley*, 42 La. Ann. 995, 8 So. Rep. 469; *McNamara v. State*, 60 Ark. 406, 30 S. W. Rep. 762. *Contra* *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580.

testimony in a criminal case than there is in a civil case, because depositions can not be taken, but there is both common law and American authority for the rejection of evidence upon a former trial except where the witness is dead¹ or insane, or, possibly, where the defendant has spirited the witness away.²

§ 190. *Practice as to receiving former testimony.*—It was formerly required that the witness should give the very words,³ but this strictness has been quite generally relaxed, since it rendered the rule an impracticable one, and in most jurisdictions it is regarded as sufficient if the witness can give the whole substance of the testimony, including that given on cross-examination.⁴ In a case where a witness stated the substance of the examination-in-chief but was unable to recollect the whole of the cross-examination, it was held that his testimony was properly excluded.⁵ In a Pennsylvania case,⁶ the court said: "All that is required is that the recollection of the witness be reasonably clear as to the fact testified to, and

¹ Lord Marley's Case, Kel. 55, 6 How. St. Tr. 771; Taylor on Ev., § 474 (citing), Reg. v. Austen, Pearce & D. 612, 7 Cox Cr. Cas. 55, and Regina v. Hagan, 8 C. & P. 167; Com. v. McKenna, 158 Mass. 207, 33 N. E. Rep. 389, and cases cited; Finn v. Com., 5 Rand. 701, and see Brogy v. Com., 10 Gratt. 722; Collins v. Com., 12 Bush. (Ky.), 271; Sullivan v. State, 6 Tex. App. 319, 32 Am. Rep. 580.

² Reynolds v. United States, 98 U. S. 145.

³ Rex v. Jolliffe, 4 T. R. 285; United States v. Wood, 3 Wash. (C. C.) 440; Wilbur v. Selden, 6 Cow. (N. Y.) 162; Foster v. Shaw, 7 S. & R. 156; Com. v. Richards, 18 Pick. 434, 29 Am. Dec. 608; Warren v. Nichols, 6 Met. 261.

⁴ Hale v. Silloway, 1 Allen 21; Wood v. Keyes, 14 Allen 236; Corey v. Janes, 15 Gray 543; Young v. Dear-

born, 22 N. H. 372; Ruch v. City of Rock Island, 97 U. S. 693; Caton v. Lenox, 5 Rand. (Va.) 31; Ballenger v. Barnes, 3 Dev. (N. Car.) 460; Wolf v. Wyeth, 11 S. & R. 149; Watson v. Gilday, 11 S. & R. 337; Jones v. Ward, 3 Jones' L. (N. Car.) 24, 64 Am. Dec. 590; Gildersleeve v. Caraway, 10 Ala. 260, 44 Am. Dec. 485; Thompson v. State, 106 Ala. 67, 17 S. Rep. 512.

⁵ Gildersleeve v. Caraway, 10 Ala. 260, 44 Am. Dec. 485.

⁶ Hepler v. Mt. Carmel Savings Bank, 97 Pa. St. 420, 39 Am. Rep. 813. As to the use of the stenographer's notes, see People v. Murphy, 45 Cal. 137; Sage v. State, 127 Ind. 15, 26 N. E. Rep. 667; Hair v. State, 16 Neb. 601, 21 N. W. Rep. 464. The judge's notes are not evidence, *per se*, unless made so by statute. Simmons v. Spratt, 26 Fla. 449, 1 So. Rep. 860.

how, if at all, such testimony was affected by the cross-examination.'"¹

Complaint of Woman in Case of Rape.

§ 191. **Complaint of outrage by prosecutrix.**—It is settled law that it is competent to show the complaints of the female in a prosecution for rape. Such complaints are not *res gestæ*.² The philosophy of the competency of this class of evidence is well stated by Woodruff, J., in *Baccio v. People*.³ The learned justice says, that the reason for admitting the declarations lies in the fact "that it is so natural as to be almost inevitable that a female upon whom the crime has been committed will make immediate complaint thereof to her mother or other confidential friend; and inasmuch as her failure to do so would be so strong evidence that her affirmation on the subject, when examined as a witness, was false, that the prosecution may anticipate such a claim by affirmative proof that such complaint was made."⁴ Mere lapse of time between the perpetration of the act and the complaint is not the test of its admissibility.⁵

¹ "I take it that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impression from these facts becomes evidence; and this on the ground that it is the best evidence of which the nature of the case is susceptible. * * * I can not, therefore, see why the same necessity which opens the way for rendering evidence of the very words of a deceased witness should not also open the door for the substance of his testimony, when his very words can not be recollected; or discern the policy of a rule which would shut out the little light that is left, merely because it may not be sufficient to remove anything like obscurity." Gibson, C. J., in *Cornell v. Green*, 10 S. & R. 14.

16—Ev.

² *State v. Campbell*, 20 Nev. 122, 17 Pac. Rep. 620; 3 Greenl., § 213.

³ *Baccio v. People*, 41 N. Y. 265.

⁴ To the same effect, *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. Rep. 880, 58 Am. Rep. 530. In 1 Hale, P. C. 632, it is said that "the complainant must make fresh discovery and pursuit of the offense and offender, otherwise it carries a presumption that her suit is but malicious and feigned." In 1 East, P. C. it is said that the evidence of the complainant "is confirmed if she presently discovered the offense and made pursuit for the offender," and that "her evidence is discredited if she concealed the injury for any considerable time after she had an opportunity to complain."

⁵ *State v. Mulkern*, 85 Me. 106, 26 Atl. Rep. 1017.

As said in one case:¹ "Any considerable delay on the part of the prosecutrix to make complaint of the outrage is a circumstance of more or less weight, depending on the surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no universal law on the subject. The law expects and reasons that it should be prompt; but there is and can be no particular time specified." In a New York case,² it was held, as a matter of law, that an unexplained delay in making disclosure for over eleven months required a reversal of the judgment of conviction. But in Connecticut convictions have been upheld although there were omissions to divulge for long periods.³ In Connecticut, Michigan and Ohio it is held that the details of the female's complaint are admissible,⁴ but most of the authorities exclude all evidence except of the insulated fact that complaint was made.⁵ There is no question that this is the correct

¹ *Higgins v. People*, 58 N. Y. 377.

² That delay may be explained, see, *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90; *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355, and note; *State v. Knapp*, 45 N. H. 148; *State v. Niles*, 47 Vt. 83; *State v. Ivins*, 36 N. J. L. 233; *Turner v. People*, 33 Mich. 363; *State v. Reid*, 39 Minn. 277, 39 N. W. Rep. 796.

³ *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. Rep. 880, 58 Am. Rep. 530.

⁴ *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90 (deaf and dumb girl); *State v. Byrne*, 47 Conn. 465 (12 year old girl).

⁵ *State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436; *People v. Glover*, 71 Mich. 303, 38 N. W. Rep. 874; *Brown v. People*, 36 Mich. 203; *McCombs v. State*, 8 Ohio St. 643; *Burt v. State*, 23 Ohio St. 394; *Dunn v. State*, 45 Ohio 249, 12 N. E. Rep. 826. In *People v. Gage*, 62 Mich. 271, 28 N. W. Rep. 835, 1 Am. St. Rep. 578, and *Dunn v.*

State, 45 Ohio 249, 12 N. E. Rep. 826, it is held that the declarations of the prosecutrix should not be given in evidence until any material delay is explained.

⁶ *People v. McGee*, 1 Denio 19; *Baccio v. People*, 41 N. Y. 265; *Stephen v. State*, 11 Ga. 225; *State v. Niles*, 47 Vt. 82; *Parker v. State*, 67 Md. 329, 1 Am. St. Rep. 387; *Lacy v. State*, 45 Ala. 80; *Ellis v. State*, 25 Fla. 702, 6 So. Rep. 768; *State v. Richards*, 33 Iowa 420; *State v. Mitchell*, 68 Iowa 116, 26 N. W. Rep. 44; *Lee v. State*, 74 Wis. 45, 41 N. W. Rep. 960; *State v. Shettleworth*, 18 Minn. 208; *McGee v. State*, 21 Tex. App. 670, 2 S. W. Rep. 890; *Castillo v. State*, 31 Tex. Cr. R. 145, 19 S. W. Rep. 892, 37 Am. St. Rep. 794; *State v. Campbell*, 20 Nev. 122, 17 Pac. Rep. 620; *Kirby v. Ter.*, (Ariz.) 28 Pac. Rep. 1134; *People v. Mayes*, 66 Cal. 675, 56 Am. Rep. 126, 6 Pac. Rep. 691.

rule on principle, for, as we have seen, the evidence is only admitted to rebut a presumption against the female which would arise in case she failed to divulge the fact that she had been outraged. There may be exceptional circumstances where the details of the woman's statement, made about the time, may be shown, as in cases where there is testimony that she made contrary statements at another time and there is room to claim that at the time of testifying she is under the domination of a person who has an object in prosecuting the defendant, but this would bring the case within an ordinary rule as to the corroborating of a witness.¹ The failure to complain goes to the credibility of the woman's story as a whole and not to the single question of consent.²

¹ *Ante*, § 92.

² *State v. Wilkins*, 66 Vt. 1, 28 Atl. Rep. 323.

CHAPTER VI.

DYING DECLARATIONS.

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§192. **Admitted only in prosecutions for homicide.**—The rule is generally stated that dying declarations, as such, are admissible only where the death of the person who made the declaration is the subject of the investigation.¹ But it has been held, where a person was indicted for the murder of A. by poison, some of which was taken by B., who also died in consequence, that B.'s dying declaration was competent, as the whole was one transaction.² In prosecutions for abortion, under statutes in which the fact of death is not an element of the offense, but only goes to fix the grade of the punishment to be suffered by

¹ *Rex v. Mead*, 2 Barn. & Cres. Ind. 338, 41 Am. Rep. 815; *People v. 605*; *Rex v. Lloyd*, 4 Car. & P. Hall, 94 Cal. 595, 30 Pac. Rep. 7. As 233; *Wilson v. Boerem*, 15 Johns. to hearsay declarations of deceased 286; *People v. Davis*, 56 N. Y. 95; persons see *post*, § 230.

Railing v. Com., 110 Pa. St. 100, 1 Atl. ² *Rex v. Baker*, 2 Mood. & Rob. 53; Rep. 314; *Com. v. Homer*, 153 Mass. State *v. Terrell*, 12 Rich. L. (S. Car.) 343, 26 N. E. Rep. 872; *Morgan v. 321*. See *Brown v. Com.*, 73 Pa. St. State, 31 Ind. 193; *Binns v. State*, 46 321, 13 Am. Rep. 740.
Ind. 311; *Montgomery v. State*, 80

the criminal, the dying declarations of the woman are not admissible.¹ Such evidence has been held competent in Wisconsin, under a statute which provides that if death ensue, as the result of a criminal abortion, the person performing the operation shall be guilty of manslaughter,² and such evidence has been held admissible in Indiana, in a strongly reasoned opinion by Elliott, J., under a statute which specifically punished the act of causing the death of a woman by performing a criminal abortion upon her.³ It is to be observed, however, that in this case the allegations of the indictment were such, that, in view of the statute, it was essential to prove the fact of the woman's death in order to convict of any offense. It is necessary in every case to show the *corpus delicti*, or, in other words, that the declarant died from the wrongful act of some one, before the state is entitled to introduce the declaration.⁴

§ 193. **Introducing does not violate constitutional right.**—The right of an accused to be confronted with the witnesses against him is not violated by the introduction of dying declarations.⁵ The deceased is not, strictly speaking, a witness. It is to be recollected that “a constitution is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to be administered, but under such limitations as the instrument imposes.”⁶ It is not to be presumed that the constitutional requirement that witnesses are to be produced was designed to exclude all such evidence as was competent at common law except such as falls from the lips of witnesses.

¹ *Rex v. Lloyd*, 4 C. & P. 233; *Reg. v. Hind*, 8 Cox C. C. 300; *People v. Davis*, 56 N. Y. 95; *Railing v. Com.*, 110 Pa. St. 100, 1 Atl. Rep. 314; *State v. Harper*, 35 Ohio St. 78, 35 Am. Rep. 596; *Com. v. Homer*, 153 Mass. 343, 26 N. E. Rep. 872.

² *State v. Dickinson*, 41 Wis. 299.

³ *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815.

⁴ *McBride v. People*, 5 Colo. App. 91, 37 Pac. Rep. 953.

⁵ *Brown v. Com.*, 73 Pa. St. 321, 13 Am. Rep. 740; *Com. v. Casey*, 11 Cush. 417, 59 Am. Dec. 150; *Com. v. Carey*, 12 Cush. 246; *Woodside v. State*, 2 How. (Miss.) 655; *Anthony v. State*, Meigs 265, 33 Am. Dec. 143; *State v. Nash*, 7 Iowa 347; *State v. Kindle*, 47 Ohio 358, 24 N. E. Rep. 485.

⁶ *Cooley's Const. Lim.*, 37, 60.

§ 194. **Ground of introduction.**—Dying declarations are admitted upon the single ground of necessity. The necessity rests primarily and principally upon the presumption that in a majority of cases there will be no equally satisfactory proof of the fact,¹ and therefore such declarations, when preceded by the proper preliminary proof, are admissible in all prosecutions for homicide.

§ 195. **Circumstances under which declaration made.**—To be admissible, the declaration must be made under a sense that dissolution is not only impending but certain.² In an English case³ it is said: "The result of the decisions is that there must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die. If we look at the reported cases, and at the language of learned judges, we find that one has used the expression, 'every hope

¹ Boyle v. State, 105 Ind. 469, 5 N. E. Rep. 203, 55 Am. Rep. 218; Nelms v. State, 13 Sm. & M. 500.

² Reg. v. Jenkins, L. R. 1 Cr. Cas. 187; Com. v. Densmore, 12 Allen 535; Starkey v. People, 17 Ill. 17; Westbrook v. People, 126 Ill. 81, 18 N. E. Rep. 304; State v. Nash, 7 Iowa 347; Wall v. State, 51 Ind. 453; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815; Adwell v. Com., 17 B. Monr. 310; State v. Wensell, 98 Mo. 137, 11 S. W. Rep. 614; Collins v. State, 46 Neb. 37, 64 N. W. Rep. 432. In Peak v. State, 50 N. J. L. 179, 12 Atl. Rep. 701, the evidence showed that a pistol ball had traversed the brain of the deceased; that she lay in a stupor, except when awakened; that the doctor had said in her conscious presence that she was liable to die at any moment, and that she had not a possible chance to live except through an operation; that the deceased had said that "she did not expect to get well, but she would like to." Held, that her declarations as to the circumstances of

her injury were inadmissible. In Rex v. Van Butchell, 3 C. & P. 629, the deceased had said, "I feel that I have received such an injury in the bowels that I shall never recover." The declaration was held incompetent for the reason that a belief on the part of the injured person that he would not ultimately recover did not necessarily involve that condition of mind which would render a dying declaration competent. In Reg. v. Megson, 9 C. & P. 418, the surgeon had stated to the deceased, two days before her death, that she was in a very precarious state. She was worse on the following day, and she said to the surgeon that she had been in hopes of getting better, but as she was getting worse she thought it her duty to mention what had taken place. It was held by Rolfe, B., that her declaration, which was then made, was inadmissible, as it did not appear that she had abandoned hope of recovery.

³ Reg. v. Jenkins, L. R. 1 Cr. Cas. 187.

of this world gone ;' another, 'settled, hopeless expectation of death ;' another, 'any hope of recovery, however slight, renders the evidence of such declarations inadmissible.' We, as judges, must be perfectly satisfied, beyond any reasonable doubt, that there was no hope of avoiding death ;¹ and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution." It was said by Skinner, J., in an Illinois case,² that "dying declarations are such as are made by the party relating to the facts of the injury of which he afterwards dies, under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance ; when he has despaired of life, and looks forward to death as inevitable and at hand." While, as already stated, the introduction of this class of evidence rests on necessity, yet the courts strenuously insist that the mind of the victim shall so realize that death is imminent and certain as to impose upon him the same obligation to speak the truth as if he were under oath. As the witness upon the stand calls upon God to witness the truth of his asseveration, so the injured man, although he does not invoke the Deity,³ has cast upon him the full sense of obligation to speak the truth, by a realization that he stands upon the threshold of the verities of the eternal world. As was said by Eyre, C. B. :⁴ "The general principle upon which evidence of this kind is admitted is that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court."

¹ As to the correctness of the last statement, see *post*, § 202. an objection to the declaration. *State v. Talbert*, 41 S. Car. 526, 19 S. E. Rep. 852.

² *Starkey v. People*, 17 Ill. 17.

³ The fact that an oath was in point of fact administered does not afford

⁴ *Rex v. Woodcock*, 2 Leach 563.

§ 196. **Sense of impending death may be inferred.**—Although it is an inflexible requirement that the declaration shall be made after an abandonment of hope of recovery, and under a realization that death is impending, still this condition of mind may be inferred from the surrounding circumstances, even in the absence of any express declaration.¹

§ 197. **Fact that death occurred some time after not conclusive.**—While the fact that the death did not follow for some time after the making of the declaration is an important consideration in determining the state of the mind of the deceased, yet such fact does not conclusively establish the incompetency of the declaration.² Although in all the cases where dying declarations have been held competent death was not postponed for any considerable time, yet in no case has it been held improper to admit a declaration merely because too long a time elapsed between the uttering of the declaration and the death. In a Massachusetts case,³ the action of the trial court in admitting the declaration was upheld, although death did not occur until seventeen days thereafter.⁴

§ 198. **On what subject dying declaration received.**—Dying declarations ought to be confined to the circumstances immediately connected with the receipt of the fatal injury. The fact of prior difficulties or prior threats can not be shown.⁵ It

¹ *People v. Green*, 1 Park. Cr. Rep. 11; *People v. Simpson*, 48 Mich. 474, 12 N. W. Rep. 662; *Collins v. State*, 46 Neb. 37, 64 N. W. Rep. 432; *Lewis v. State*, 9 Sm. & M. 115; *McLean v. State*, 16 Ala. 672; *Hill v. Com.*, 2 Gratt. 594; *People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. Rep. 310. Where the deceased was suffering the most extreme pain, and repeatedly declared that he was going to die, the action of the lower court in receiving his declaration as to how he received his wound was upheld, notwithstanding the fact that he sent for a physician. His motive in so doing may have been

prompted by the hope that he might obtain relief from pain. *McQueen v. State*, 103 Ala. 12, 15 So. Rep. 824.

² *Roscoe's Cr. Ev.*, star p. 32; 1 Phil. on Ev., (1849 ed.) 285; 1 Greenl. on Ev., § 158; *Com. v. Cooper*, 5 Allen 495, 81 Am. Dec. 762; *State v. Schmidt*, 73 Iowa 469, 35 N. W. Rep. 590; *Jones v. State*, 71 Ind. 66.

³ *Com. v. Cooper*, 5 Allen 495, 81 Am. Dec. 762.

⁴ See *Jones v. State*, 71 Ind. 66.

⁵ *Binns v. State*, 48 Ind. 311; *Jones v. State*, 71 Ind. 66; *Reynolds v. State*, 68 Ala. 502; *Sullivan v. State*, 102 Ala. 135, 15 So. Rep. 264, 48 Am. St. Rep. 22;

was said in an Alabama case,¹ that the declarant "can only speak of the transaction which causes the death, and such accompanying statements and conduct as shed light upon it—the *res gestæ* in a strict sense."

§ 199. **Matters of opinion excluded.**—Dying declarations are only admissible as to matters that the declarant, if living, might have testified to upon the stand.² Matters of conjecture are especially objectionable, as where the victim states his bare suspicion as to who injured him.³ The question as to how far the deceased may go in the expression of an opinion is not an entirely settled one upon the authorities. It would seem that it would be at least permissible for him to give an opinion—if it may be called such—as to the identity of the accused, not only for the reason that that would be a fact which was based upon the immediate knowledge of his own senses, but for the further reason that it would be difficult, if not impossible, to put in evidence the grounds or reasons of such knowledge.⁴ Where the declaration included the statement that the act was "purposely done," it was excluded.⁵ In another case the following declaration was held incompetent: "Bill, it is pretty hard to go through the whole war, and come home and be murdered on my own farm."⁶ The correctness of the conclusions reached in these cases seems quite clear, but there is a class of cases where the courts are far from agreed; that is, where a statement is made of a negative matter in the shape of a con-

Warren v. State, 9 Tex. App. 619, 35 Am. Rep. 745; State v. Perigo, 80 Iowa 37, 45 N. W. Rep. 399.

¹ Sullivan v. State, 102 Ala. 135, 15 So. Rep. 264, 48 Am. St. Rep. 22.

² Boyle v. State, 105 Ind. 409, 5 N. E. Rep. 203, 55 Am. Rep. 218; Matherly v. Com. (Ky.), 19 S. W. Rep. 977.

³ Shaw v. People, 3 Hun 272; People v. Shaw, 63 N. Y. 36; People v. Wasson, 65 Cal. 538, 4 Pac. Rep. 555.

⁴ Brotherton v. People, 75 N. Y. 159. See People v. Wasson, 65 Cal. 538, 4 Pac. Rep. 555.

⁵ State v. Donnelly, 69 Iowa 705, 27 N. W. Rep. 369, 58 Am. Rep. 234. See State v. Nettlebush, 20 Iowa 257.

⁶ State v. Perigo, 80 Iowa 37, 45 N. W. Rep. 399. In this case the court said: "All vague and indefinite expressions, all language that does not distinctly point to the cause of death and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the respondent, should be held inadmissible." See State v. Center, 35 Vt. 378.

clusion. In an Indiana case,¹ a statement was held proper that the defendant had shot the declarant "without cause." In an Alabama case,² the court upheld the admission of the following statement: "He cut me for nothing. I never did anything to him." The court said that the statement evidently related to the transaction, and was proper as a collective fact. The same ruling was made in a Louisiana case,³ where the statement was: "He ought not to have shot me; he had no reason to shoot me; there was no offense given." In *Wroe v. State*⁴ the court held that it was competent for the declarant to state that the shooting was without provocation. The case last cited was followed in a Mississippi case.⁵ On the other hand, it was held in Kentucky,⁶ that it was not competent for the declarant to state that the defendant "killed" him "for nothing." A number of cases upholding the admissibility of this class of declarations are founded on *Wroe v. State, supra*.⁷ In that case the court admits that the fact was not stated in its most elementary form, but based its ruling on the authority of *Rex v. Scaife*,⁸ where the declaration was: "I don't think he would have struck me if I had not provoked him." It will be observed, however, that this declaration was favorable to the defendant, and although it is a *petitio principii*, there has been a disposition manifested to waive the question in favor of the defendant.⁹ Even as against the weight of authority, the writer ventures to express his disapprobation of the cases admitting non-elementary conclusions made in dying declarations, in instances where the facts could be stated and where such conclusions relate to matters which are in controversy upon the evidence. The anxiety of courts to bring man-slayers to justice has led to the disregard of strict principle upon a point where it ought not to be relaxed, be-

¹ *Boyle v. State*, 105 Ind. 469, 5 N. E. Rep. 203, 55 Am. Rep. 218.

² *Sullivan v. State*, 102 Ala. 135, 15 So. Rep. 264, 48 Am. St. Rep. 22.

³ *State v. Black*, 42 La. Ann. 861, 8 So. Rep. 594.

⁴ *Wroe v. State*, 20 Ohio St. 460.

⁵ *Payne v. State*, 61 Miss. 161.

⁶ *Collins v. Com.*, 12 Bush 271.

⁷ *Wroe v. State*, 20 Ohio St. 460.

⁸ *Rex v. Scaife*, 1 Moody & R. 551.

⁹ *McPherson v. State*, 22 Ga. 478; *Brock v. Com.*, 92 Ky. 183, 17 S. W. Rep. 337.

cause of the want of opportunity upon the part of the defendant to test such opinion by cross-examination.¹ In the dissenting opinion of Zollars, J., in the case of *Boyle v. State*, *supra*,² the objections to the reception of the class of evidence are very strongly set forth.³

¹In *Shaw v. People*, 3 Hun 272, it is said: "It is even more important to exclude an opinion *in articulo mortis* than in an ordinary case, where the witness may be subjected to a cross-examination." In *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815, it is said: "What the purpose of an act was is an inference from facts, and witnesses must state facts, and not their conclusions. A witness would have been required to state what was said and done. Facts are to be stated by witnesses; inferences to be made by the jury. This rule should be applied with zealous care to dying declarations. As the accused can not cross-examine, there is no means of testing the correctness of the conclusions. It may be entirely without foundation in fact. But we need not discuss this question, for it is settled that dying declarations must speak to facts only, and not to mere matters of opinion."

²*Boyle v. State*, 105 Ind. 469.

³In the opinion mentioned, Zollars, J., says: "It must be kept steadily and prominently in view that appellant admits the shooting, and defends upon the sole ground that he had a 'reason' or 'cause' for so doing. In other words, his defense is that the shooting was justifiable because done in self-defense. * * * Whether appellant had a 'reason' or 'cause' for the shooting is, in some sense, a fact, but it is not a fact that a witness may state. It is the ultimate fact to be found from all the facts and circumstances attending the killing. If a fact, in any sense, it is the ultimate

fact, which, in this case, settles the guilt or innocence of appellant. If a fact at all, it is an inferential fact, depending upon other and primary facts. No person, not present, could say that there was no 'reason' or 'cause' for the shooting. Why? Because he would have no knowledge of the facts and circumstances attending the shooting. A knowledge of these facts is absolutely essential to such a statement. How then is such a conclusion and statement to be arrived at? Clearly, the witness must take the facts and circumstances, weigh them, reason about them, and by this process arrive at a conclusion. The conclusion that there was no 'reason' or 'cause,' is the result of mental process, and can be arrived at in no other way. It can not be settled by the physical senses. It can neither be seen, heard, nor felt, but must be the result of reasoning from other facts. If so, clearly the result of such mental process is not, in the common and legal sense, a fact. * * * How shall the jury get at the facts? Shall they perform the mental process, make the inference and form their opinion from the facts and circumstances attending the shooting, or shall that be done for them by the witnesses—in this case by the dying man? Shall he give to the jury the facts and circumstances, or shall he keep them to himself, and give to them the ultimate fact that he has inferred from the facts and circumstances, his opinion upon those facts and circumstances? Could the jury have the facts and circumstances, they

§ 200. **Must be complete in itself.**—Professor Greenleaf says: “But whatever the statement may be, it must be complete in

might readily disagree with him as to the existence of a ‘reason’ or ‘cause’ for the shooting. Had he stated the facts and circumstances, it might readily have appeared to the court that the declaration was but an opinion without sufficient facts upon which to rest. It is stated in the principal opinion that such a conclusion (the declaration) ‘is not the expression of an opinion, but is the statement of a conclusion of fact, from observed facts, which, under all the authorities, is competent.’ I can not concur in this, either as a general proposition of law or as applied to this case. My understanding of the law is, that in no case is it competent for a witness to state an inference or conclusion from the facts, where it is possible to give the facts to the jury. A non-expert witness may, in some cases, express an inference or opinion, but the uniform holding of this court has been, as I understand it to be the rule everywhere, that he can not express an opinion until he has first, so far as it is possible, stated the facts upon which the opinion is based. * * * There are cases where the witness can not put before the jury, in an intelligible and comprehensible form, the whole ground of his judgment or opinion. In such cases, after the witness has stated all the facts that it is possible to state, he may, from the necessity of the case, give an opinion. * * * In the case of *State v. Williams*, 67 N. C. 12, after holding that statements of personal identity are opinions, admitted from necessity, that there must be a limit to the admission of opinions, and that the witness can not substitute his judgment for that of the tribunal to whom the law has committed

the decision of the fact, it was said: * * * ‘Whenever the opinion of the witness upon such a question, or of one coming under the same rule, is the *direct* result of observation through his senses, the evidence is admitted. * * * But if the opinion of the witness is the result of a course of reasoning from collateral facts, it is inadmissible. * * * In such case the tribunal is as competent to reason out the resultant opinion as the witness is; and by the theory of law, it alone is competent to do so.’ * * * It is further stated in the principal opinion that the declaration was the statement of a negative fact, and that negative facts can only be proven by a denial. I respectfully submit that this assumes the point in controversy. A negative fact, it may be, can be proven by a denial; but a negative conclusion can not. * * * The principal opinion distinguishes between the existence of a sufficient or insufficient reason, and holds that a witness may state that there was no reason, because he thereby but states a fact, and that he can not state that there was a sufficient or insufficient reason, because he would thereby express an opinion. In my judgment, the difference is in degree and not in quality. In either case, the witness must reason from the primary facts. If he says there was no reason, he expresses a conclusion and opinion. If he says there was no sufficient reason, he expresses a double conclusion and opinion; one as to the existence, and the other as to the sufficiency of the reason. The declaration that appellant ‘had no reason that I know of,’ I submit, shows upon its face that Casey was not stating a fact, but an opinion.

itself; for if the declarations appear to have been intended by the dying man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received."¹ The Supreme Court of Vermont,² after quoting this statement, said: "What we understand by the expression 'must be complete in itself,' is, not that the declarant must state everything that constituted the *res gestæ* of the subject of his statement, but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact."

§ 201. **Dying declaration may be by signs.**—In cases where the victim is unable to speak, the facts may be communicated by signs. In a Massachusetts case,³ the injured person was requested to squeeze the hand of her interrogator, if it was the defendant who had injured her, and thereupon she responded as indicated. Her purpose so to express herself was verified in a like manner on two other occasions. The court held the evidence admissible.⁴

§ 202. **Question of competency for court.**—It is for the court to determine whether the declaration was made under such circumstances as to warrant its reception. The question can not be left to the jury. This was settled in England, by a conference of the judges, held in the year 1790.⁵ While a cause will be reversed for clear error in admitting the declaration of a deceased person, yet the cases recognize that there is such a considerable degree of discretion vested in the trial court, in determining as to the competency of the declaration, that its action in admitting it will not be ground for reversal unless

And for such an opinion a witness could not be convicted upon the charge of perjury, however unfounded it might be, because it is not the statement of a fact. *Commonwealth v. Brady*, 5 Gray 78."

¹ 1 Greenl. on Ev., § 159.

² *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200.

³ *Com. v. Casey*, 11 Cush. 417, 59 Am. Dec. 150.

⁴ See *Jones v. State*, 71 Ind. 66.

⁵ 3 Russ. on Cr. (4 Eng. ed.), 226; *Donnelly v. State*, 26 N. J. L. 463; *Starkey v. People*, 17 Ill. 17.

the error is manifest.¹ It has been laid down, that the judge should not admit such declarations "if the proof does not satisfy the court beyond a reasonable doubt that they were made in extremity and that they are dying declarations under the law;"² but this doctrine has been denied in Kansas,³ the court saying: "It was a question of the admissibility of evidence, and was governed by the same rules that govern the admission of all other evidence." An analagous question is discussed in another portion of this work.⁴

§ 203. **Weight to be given to dying declarations.**—If the judge decides that the evidence is competent, then the jury is entitled to know all the attending circumstances, and it is then a question for the jurors to determine what weight, if any, shall be given the declaration.⁵ Although the expression is often used that a declaration made *in extremis* is equivalent to an oath, yet such expression has reference to the philosophy of this exception to the general rule excluding hearsay evidence, and is not to be regarded as warranting an instruction that such a declaration should receive the same weight as if made under oath. Such an instruction would be palpable invasion of the jury's province.⁶ In a strict sense there is no warrant for a discussion of the weight of dying declarations in a legal work, because this is a question of fact and not of law, but it is not inappropriate to call attention to some matters which affect the

¹ *Swisher v. Com.*, 26 Gratt. 963, 21 Am. Rep. 330; *State v. Cantieny*, 34 Minn. 1, 24 N. W. Rep. 458. See *ante*, Confessions, § 120.

² *Skinner, J.*, in *Starkey v. People*, 17 Ill. 17.

³ *State v. Furney*, 41 Kan. 115, 21 Pac. Rep. 213, 13 Am. St. Rep. 262.

⁴ See *ante*, Confessions, § 120.

⁵ 1 Phil. on Ev. (1849 ed.), 291; 3 Phil. on Ev. (1849 ed.), 256; *People v. Abbott*, (Cal.) 4 Pac. Rep. 769; *Hays v. Com.*, (Ky.) 14 S. W. Rep. 833.

⁶ *Rex v. Crockett*, 4 C. & P. 544; *State v. Vansant*, 80 Mo. 67; *State v. Mathes*, 90 Mo. 571, 2 S. W. Rep. 800; *State v. Eddon*, 8 Wash. 292, 36 Pac. Rep. 139. In *State v. Pearce*, 56 Minn. 226, 57 N. W. Rep. 652, it is said: "When a court in such cases assumes to determine for the jury the degree or amount of credit which should be given to the evidence, it is passing the danger line, and trenching upon the general and well-settled rules of evidence."

weight of this class of evidence. In an Alabama case,¹ it is suggested that dying declarations usually possess the following infirmities: 1. There is no cross-examination; 2. The jury can not observe the temper and manner of the declarant; 3. Such declarations are usually testified to by friends, relatives and other biased persons; 4. There is a liability of misunderstanding; and, 5. There is a liability that the deceased has asserted as facts those things of which he has only strong convictions, but of which he has no knowledge from his senses. In an Illinois case,² it is said: "It is in vain to attempt to disguise the infirmities and imperfections of the human mind, and its susceptibility to false impressions, under circumstances touching the heart and exciting the sympathies; and the law has wisely, in the case of dying declarations, required all the guaranties of truth the nature of the case admits of." In the dissenting opinion of Zollars, J., in an Indiana case,³ are found the following thoughtful observations: "Such evidence, doubtless, has a most potent influence with juries because of the solemnity of the occasion under which it is rendered, and yet the truth is that, in many, if not in most, cases, it is the weakest kind of evidence when looked upon aside from mere sentiment. The dying man is not allowed to make his statements until those about him think that he is near the end, and he sees, or thinks he sees, the shadows of death settling about him. Under such circumstances, and at such a moment, if he is a believer in personal responsibility and a future state, the mind will be centered upon and more concerned about that near future than about the things that are receding from view. And hence statements made under such circumstances, as to how the injury was received, etc., come with that infirmity that always attends inattention. Especially will this be the result of a process of reasoning, as an inference, conclusion or opinion. It often happens, too, that in such an extremity the mind is not in its full vigor. The

¹Shell v. State, 88 Ala. 14, 7 So. State, 25 Tex. App. 293, 7 S. W. Rep. Rep. 40. 868.

²Starkey v. People, 17 Ill. 17.

³Boyle v. State, 105 Ind. 469, 5 N.

⁴Quoted approvingly in Drake v. E. Rep. 203, 55 Am. Rep. 218.

memory may have been confused and the reason blunted from physical suffering or mental anxiety. In such a condition the mind yields ready assent to what may be suggested, and the person states as a fact what is in truth a conclusion or an opinion, which would clearly appear to be erroneous were the facts stated upon which they are based. And if facts are stated, it may be that but a part are stated, and the most important being omitted. * * * However depraved a person may be, there is yet an unwillingness to be thought to have been in the wrong, and hence there is an inclination to so warp and color statements that surviving friends, at least, shall believe in the innocence of the dead. It is a fact, too, that the expectation of death does not always make a good man of a bad one, nor a truthful man of a reckless one. Many have gone to their death with vengeance in their hearts and curses upon their lips. The cases are many where guilty murderers have stood upon the gallows, and with dying breath asseverated their innocence. As a rule, persons injured in personal collisions are not of the most blameless character. The rule is doubtless otherwise. Not infrequently they are persons who have no regard for others' rights, and regard not the law except as they fear it. When the fear of prosecution for perjury is removed, they have no incentive for truth, even in the face of death."¹ While the considerations suggested in the

¹The necessity for great care in the reception of dying declarations is illustrated by the case of *Peak v. State*, 50 N. J. L. 179, 12 Atl. Rep. 701. In that case a girl had been shot by an unknown person. The defendant, her suitor, was charged with, and put on trial for, her murder. It appeared from the evidence that when the defendant heard she had been shot, he hastened at once to her house, and found the neighbors in the act of laying her on the bed. He instantly went to her, and kissed her, saying, "Katie, who shot you?" She made no reply. Then he sat by her for

some time, holding her hand. Her father said to her, "Katie, this is too bad," and the reply was, "Yes, father, but I couldn't help it." Again, on the following morning, the defendant, in the presence of her mother, kissed the deceased, she kissing him; and he again asked, "Katie, who shot you?" the response being, "Well, he is a nasty, dirty rascal." Again he pressed the question, and the reply made this time the mother could not remember. At still another interview the defendant importuned her to state who shot her. Finally, at another time, in the defendant's absence, she

opinion quoted should serve to prevent the giving of unlimited credence to dying declarations, yet it is equally certain that the circumstances under which such utterances are made give to them a sanction which under some circumstances may warrant their implicit acceptance. As said in a Minnesota case,¹ "It may be that some men do go down to death with a lie upon their lips, and that their last utterances are full of falsehoods, but such cases are exceptions to the general rule, and do not furnish proper ground for the rejection of dying declarations as evidence when offered within the ordinary rules upon the subject, any more than it would be proper to exclude any testimony because some witnesses perjure themselves when testifying under oath."

§ 204. Right of accused to impeach or discredit declaration.—While in a particular case it may be contended as a matter of fact that a dying declaration has all the sanction of an oath, yet it must be remembered that the opportunity of investigating the truth is very different, and for that reason the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of a fuller investigation by means of cross-examination.² The declarations of the deceased are open to direct contradiction³ or to other impeachment.⁴

said, when her mother asked the question as to how she was shot: "Bert [the defendant] did it." Both the incriminating declaration and the prior interviews are well authenticated. It is very difficult to account for the strange conduct of the deceased. It might be explained upon the theory that the defendant accidentally shot her; that they had agreed, or she had determined, that the defendant should be shielded, and that when importunity did lead her to make the statement implicating him, her power to concentrate her mind upon the subject was so impaired that she failed to make the explanation.

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¹ *State v. Pearce*, 56 Minn. 226, 57 N. W. Rep. 652.

² *Ashton's Case*, 2 Lewin C. C. 147. In *Com. v. Cooper*, 5 Allen 495, 81 Am. Dec. 762, it was held competent to show that the deceased frequently mistook the identity of persons he was well acquainted with.

³ *People v. Lawrence*, 21 Cal. 368; *Battle v. State*, 74 Ga. 101; *Felder v. State*, 23 Tex. App. 477, 5 S. W. Rep. 145, 59 Am. Rep. 777; *Roscoe's Cr. Ev.*, star p. 55. See *Wroe v. State*, 20 Ohio St. 460.

⁴ *Roscoe's Cr. Ev.*, star p. 35; *Whar. on Homicide*, § 773.

The defendant is entitled to show the exact state of mind of the declarant at the time he made the declaration,¹ and, as a belief in a future state of rewards and punishments is necessary to justify the reception of dying declarations, it is competent for the defendant to show that the declarant was a disbeliever.² So far as the matter of belief is concerned, there is no doubt that the *prima facie* intendment is in favor of the competency of the declaration.

§ 205. **Competency of declarant as witness.**—If for any reason the declarant would have been an incompetent witness, had he continued in life, that fact will operate to exclude his declarations.³

§ 206. **When written declaration is primary evidence.**—The authorities agree, if a dying declaration is reduced to writing and is signed by the declarant, that the writing becomes the primary evidence.⁴ Even if the statement is not signed, yet if it is reduced to writing as the formal statement of the declarant, and is read by or to him, and receives his sanction, authority is not wanting that the writing must be produced.⁵ Where, however, declarations were made which were not reduced to writing, the fact that a declaration in writing was made at another time will not suffice to exclude the oral declaration.⁶

¹ Roscoe's Cr. Ev., star p. 36.

² Goodall v. State, 1 Ore. 333, 80 Am. Dec. 396; Rex v. Pike, 3 Car. & P. 598. In Pike's Case, 3 Carr. & P. 598, the dying declarations of a child of four years were rejected because it was considered that, however precocious her mind, she could not possibly have any idea of a future state.

³ 1 Greenl. on Ev., § 157.

⁴ Rex v. Gay, 7 Car. & P. 230; State v. Kindle, 47 Ohio 358, 24 N. E. Rep.

485; Saylor v. Com., (Ky.) 30 S. W. Rep. 390; Turner v. State, 89 Tenn. 547, 15 S. W. Rep. 838; State v. Tweedy, 11 Iowa 350.

⁵ Whar. Cr. Ev., § 295; People v. Callaghan, 4 Utah 49, 6 Pac. Rep. 49; State v. Cameron, 2 Chand. 172. See State v. Kindle, 47 Ohio 358, 24 N. E. Rep. 485.

⁶ 1 Phil. on Ev., (1849 ed.) 290, citing Rex v. Reason, 16 Howell St. Tr. 1, 31, 1 Stra. 499.

CHAPTER VII.

EXPERT AND OPINION EVIDENCE.

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| § 207. Opinion evidence incompetent, except under special circumstances. | § 214a. Limitations upon the competency of non-expert opinion evidence. |
| 208. Questions on which the opinions of experts can be received. | 215. Speed of trains, etc. |
| 209. Who is an expert. | 216. Subscribing witnesses. |
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| 214. Non-expert evidence upon the subject of sanity. | 221. Cross-examination of witness as to handwriting. |
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| | 223. Qualification of expert as to handwriting. |

§ 207. **Opinion evidence incompetent, except under special circumstances.**—It is evident, upon even superficial consideration, that a legal tribunal, which possesses compulsory process, and which is authorized to weigh evidence and to draw all proper inferences from facts proved, should ordinarily reject evidence of mere opinions. “It is no satisfaction for a witness to say that he thinks, or persuadeth himself, and this for two reasons: First. Because the judge is to give an absolute sentence, and for this ought to have a more sure ground than thinking. Secondly. The witness can not be sued for perjury.”¹ In cases, however, involving questions of science, skill, trade and the like, and in cases where it is difficult for a witness to adequately state the facts without resort to opinion, it is competent to introduce opinion evidence. These cases, although in the nature of exceptions, are as thoroughly vindicated as the principal rule.

¹ Dyer, 53 b., pl. 11, in marg. ed. 1688.

§ 208. **Questions on which the opinions of experts can be received.**—The rule excluding opinion evidence operates to the point where the jury will be materially aided by receiving an opinion. An expert can not testify upon a matter, capable of being explained, concerning which men in the ordinary walks of life would usually be capable of forming a correct opinion, if they were informed as to the facts upon which the opinion would have to be based.¹ If, however, the inquiry is of such a character that a person, who has a special familiarity with the nature of the matter involved, can be said to stand upon a higher plane of judgment than the ordinary individual, then the inquiry is one which may properly be elucidated with the aid of expert opinion. It is not necessary that the question involved should be of an abstruse, scientific character. The opinion of a mechanic or workman is frequently competent, on a matter pertaining to his business or employment; thus, such opinions may be competent on questions concerning the use of materials and appliances,² and as to the sufficiency of the construction of unusual or complicated ma-

¹ *Clifford v. Richardson*, 18 Vt. 620; *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. Rep. 393; *Clark v. Fisher*, 1 Paige 171, 19 Am. Dec. 402; *Connelly v. Hamilton Woolen Co.*, 163 Mass. 156, 39 N. E. Rep. 787; *Dooner v. Delaware & H. Canal Co.*, 164 Pa. St. 17, 30 Atl. Rep. 269; *Lincoln, etc., R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. Rep. 859; *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. Rep. 251; *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59; *Otis v. Thom*, 23 Ala. 469, 58 Am. Dec. 303. Space will permit the use of but a few illustrations of this proposition, although there are many authorities. An expert can not be permitted to testify that a shaft in which a key way with sharp edges is sunk is more likely to catch clothing than a plain shaft,

Connelly v. Hamilton Woolen Co., 163 Mass. 156, 39 N. E. Rep. 787; or that a car unprovided with handles was unsafe for brakemen, *Dooner v. Delaware & H. Canal Co.*, 164 Pa. St. 17, 30 Atl. Rep. 269; or as to the cause of a fire, *Cook v. Johnston*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. Rep. 388; or as to the proper time to burn a fallow, *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544; or as to whether it is prudent and careful to leave a horse unhitched in a mill-yard. *Stowe v. Bishop*, 58 Vt. 498, 56 Am. Rep. 569; or as to whether a sidewalk is dangerous. *District of Columbia v. Haller*, 22 Wash. L. Rep. 761.

² 1 Whar. on Ev., § 444, and cases cited; *Lawson on Expert and Opinion Ev.*, Chap. 5, and cases cited.

chinery.¹ The opinion of an expert can not be received upon matters of legal or moral obligation, nor on the manner in which other persons would probably be influenced if the parties acted in one way rather than another.² It is seldom, if ever, that a witness, whether an expert or not, can be permitted to express an opinion on the ultimate question the jury is called upon to decide.³ For instance, an expert, after describing a machine or appliance, may, under some circumstances, testify that it was so constructed as to render its use attendant with danger, but he would not be permitted to state that it was negligent to permit it to be used. So, an expert on mental disease, while he might be permitted to testify that a person he had treated had sufficient mental capacity at a certain time to know the extent and value of his property, the number and names of the persons who were the natural objects of his bounty, their deserts with reference to their conduct and treatment of him, and their capacity and necessity, yet the witness should not be permitted to testify that such person had at the time a sufficient capacity to make a will, where that is the question in issue.

§ 209. Who is an expert.—In a Pennsylvania case,⁴ the supreme court of that state said: “An expert, as the word imports, is one having had experience. No clearly defined rule is to be found in the books as to what constitutes an expert. Much depends upon the nature of the question in regard to which the opinion

¹ *Lau v. Fletcher*, 104 Mich. 295, 62 N. W. Rep. 357; *Neubauer v. North. Pac. R. Co.*, 60 Minn. 130, 61 N. W. Rep. 912; *Excelsior Electric Co. v. Sweet*, 57 N. J. Law 224, 30 Atl. Rep. 553; *Lang v. Terry*, 163 Mass. 138, 39 N. E. Rep. 802; *McGonigle v. Kane*, 20 Colo. 292, 38 Pac. Rep. 367; *Grant v. Varney*, 21 Colo. 329, 40 Pac. Rep. 771.

² 1 Greenl. on Ev., § 441, citing *Campbell v. Rickards*, 5 B. & Ad. 840.

³ *Chicago, etc., R. Co. v. Modesitt*,

124 Ind. 212, 24 N. E. Rep. 986; *Johnson v. Anderson*, 143 Ind. 493, 42 N. E. Rep. 815; *Lawson on Expert and Opinion Ev.*, 137, *et seq.* A possible exception to this rule may be found to exist in cases where the value of property, concerning which witnesses may testify, is identical with the measure of damages. See *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156, and cases there cited.

⁴ *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146.

is asked." As Mr. Lawson states:¹ "An expert may be qualified by study without practice, or by practice without study. But mere observation without either is insufficient." The law does not fix any precise degree of knowledge which a witness must possess to give expert evidence, but, if he would so testify, he must have such a familiarity with the subject as qualifies him to express an opinion.² A considerable degree of discretion is vested in the trial judge, in determining whether a witness shall be permitted to testify as an expert, and his decision will not be reversed on appeal except for plain error.³

§ 210. **Form of question to expert.**—The value of an expert's opinion is largely dependent upon the facts which he takes into consideration in forming his conclusion. As a consequence, he is not allowed to pass on disputed facts in evidence, by expressing an opinion on the evidence.⁴ For the same reason, it is a general rule that the facts on which the witness is expected to express an opinion must be stated to him in the form of a hypothetical question, in all cases where the facts are in dispute, unless it appears from his testimony just what he assumes the facts to be in answering the question.⁵ In the case of a physician, however, it is permissible, in asking him a hypothetical question as to the physical condition of another, to include in the question the knowledge which the physician obtained by a personal examination of such person.⁶ Upon a matter of this kind, which is largely the result of the direct evidence of his senses, he is competent to express an

¹ Lawson on Expert and Opinion Ev., 210.

² Parker v. State, 136 Ind. 284, 35 N. E. Rep. 1105.

³ Lawson on Expert and Opinion Ev., 236.

⁴ *In re Snelling's Will*, 136 N. Y. 515, 32 N. E. Rep. 1006; *Carpenter v. Leavitt*, 10 Misc. 49, 30 N. Y. Supp. 808. But he may testify to his opinion based on his understanding of the

prior evidence, where it admits of but one interpretation. *Stoddard v. Winchester*, 157 Mass. 567, 32 N. E. Rep. 948.

⁵ *In re Snelling's Will*, 136 N. Y. 515, 32 N. E. Rep. 1006; *Frankfort v. Manhattan R. Co.*, 12 Misc. 13, 33 N. Y. Supp. 36; *Mucci v. Houghton*, 89 Iowa 608, 57 N. W. Rep. 305.

⁶ *Tebo v. Augusta*, 90 Wis. 405, 63 N. W. Rep. 1045.

opinion, upon grounds which will be considered in the course of this chapter,¹ and it is therefore not a valid objection that there is involved in the question the element as to his opinion concerning facts which he is called on to take into consideration because of his personal knowledge, but the witness should first be required to state such facts as fully as possible. There may be other cases which fall within this exception to the rule which forbids the blending of expert testimony with matters of which the witness claims personal cognizance. It is not ordinarily a ground of objection to a hypothetical question that there is an omission in the question of one or more matters upon which there is evidence, because it is for counsel to determine, in framing his question, as to whether he will assume that a certain point upon which there is evidence has been sufficiently proved.² There must be some evidence tending to support each element of the hypothesis, but it is not necessary that this evidence should be direct; it will suffice, to meet an objection on this ground, that evidence has been introduced from which the jury might draw the inference.³ It is the right of a party producing an expert witness to an explanation of the grounds of his opinion.⁴ If any fact which opposite counsel deems material is omitted from the hypothesis, his remedy is to include such fact in questions propounded on cross-examination,⁵ and, it is apprehended, that on cross-examination it is competent, in the discretion of the court, to call for the opinion of an expert upon a purely fanciful hypothesis, as one of the means of testing his expert character. A physician may testify as to the probable effect of a physical injury,⁶ but since even experts are not permitted to

¹ *Post*, § 213.

² *Stearns v. Field*, 90 N. Y. 640; *Davidson v. State*, 135 Ind. 254, 34 N. E. Rep. 972; *Lee v. Heuman*, (Tex. Civ. App.) 32 S. W. Rep. 93.

³ *Smith v. Chicago, etc., R. Co.*, 119 Mo. 246, 23 S. W. Rep. 784; *Powers v. Kansas City*, 56 Mo. App. 573; *Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. Rep. 594; *Baker v. State*, 30 Fla. 41, 11 So. Rep. 492.

⁴ *Lawson's Expert Ev.*, 230, citing *Hawkins v. City of Fall River*, 119 Mass. 94; *Dickenson v. Inhabitants of Fitchburg*, 13 Gray 546; *Woodman v. Dana*, 52 Me. 9.

⁵ *Davidson v. State*, 135 Ind. 254, 34 N. E. Rep. 972.

⁶ *Barr v. City of Kansas*, 121 Mo. 22, 25 S. W. Rep. 562.

offer merely speculative opinions,¹ it has been held that it is incompetent for a plaintiff in a suit for an injury to her person to prove by a physician the effects which are apt to result from her injury.²

§ 211. **Distinction between expert and opinion evidence.**—In a general sense all opinion evidence may be said to consist of the opinion testimony of persons who have had an experience which especially qualifies them for the expression of such opinion. But strictly speaking, however, the expert is a person who by special study or practice has become qualified to express an abstract opinion upon a particular subject, while the ordinary witness may only be permitted to express his opinion upon a concrete matter, the ground for the expression of his opinion being especial opportunity for observation, and, in some cases, the necessity of the case.³

§ 212. **Opinions as to value.**—"These opinions," says Gray, J., in a Massachusetts case,⁴ "are admissible, not as being the opinions of experts strictly so called, for they are not founded on special study or training or professional experience, but rather from necessity, upon the ground that they depend upon knowledge which any one may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable evidence of the fact to be proved." Two questions ordinarily arise concerning the reception of evidence of value. First. Is the witness acquainted with the in-

¹Lawson on Expert and Opinion Ev., 164.

²Lewis v. Brooklyn Elev. R. Co., 7 Misc. 286, 27 N. Y. Supp. 889.

³It is not competent for a witness to state that he was in a better position to see up the track than J., Helton v. Alabama Midland, etc., R. Co., 97 Ala. 275, 12 So. Rep. 276; or that a dance was indecent, Brinkley v. State, 89 Ala. 34, 8 So. Rep. 22, 18 Am. St. Rep. 87; or as to what the deceased intended to do when he put his hand to

his hip-pockets. Walker v. People, 133 Ill. 110, 24 N. E. Rep. 424; or that if a ladder had been thoroughly inspected the defect could have been discovered, Allen v. Union Pac., etc., R. Co., 7 Utah 239, 26 Pac. Rep. 297; or that the appearance of a room indicated that there had been a scuffle. State v. Coella, 8 Wash. 512, 36 Pac. Rep. 474.

⁴Swan v. County of Middlesex, 101 Mass. 177.

herent properties of the object? Second. Is he acquainted with the market?¹ Doubtless the first element may be supplied in most cases by a resort to hypothesis. As to the second element, it is to be recollected that such experience is gained as the business world usually gains knowledge, and it would, therefore, be a mistake to exclude the testimony of such a witness until it appeared that he had resorted to the primary sources of information.² It is therefore held that men engaged in business, and of considerable experience, may testify to values, in a distant city, of products in which they deal, although their information comes chiefly from price-current lists and returns from sales.³ In Michigan the courts admit market reports of such newspapers as it is shown that the commercial world relies on as evidence of market value,⁴ but it was held in a New York case⁵ that it was error to permit a shipping and price-current list to go in evidence, without some proof as to how the quotations were obtained, and as to whether they were based on actual sales. It would seem that the true rule should be, as in the case of books relative to the non-exact sciences, in order to guard against error, to insist on the exclusion of these secondary sources of evidence, and to take the evidence of value from witnesses who, although they may have resorted for their information to these very sources, have such a measure of experience that the misprinting of a figure would not

¹ If the article is one of such a common character that all persons may be presumed to have some knowledge of its value, or if the witness, from his employment, may be presumed to have such knowledge, formal proof of that element may be dispensed with. *Tubbs v. Garrison*, 68 Iowa 44, 25 N. W. Rep. 921; *State v. Johnson*, 1 Mo. App. 219; *Mercer v. Vose*, 67 N. Y. 56; *Storms v. Lemon*, 7 Ind. App. 435, 34 N. E. Rep. 644.

² *Whitney v. Thacher*, 117 Mass. 523.

³ *Whitney v. Thacher*, 117 Mass. 523; *Central Railroad, etc., Co. v. Skellie*, 86 Ga. 686, 12 S. E. Rep. 1017; *Inter-*

national, etc., R. Co. v. Dimmitt, etc., Co., 5 Tex. Civ. App. 186, 23 S. W. Rep. 754; *Hudson v. Northern Pac., etc., R. Co.*, 92 Iowa 231, 60 N. W. Rep. 808, and see *Finnerstein's Champagne*, 3 Wall. 145; *Lush v. Druse*, 4 Wend. 313; *Keith v. Haggart*, 2 N. D. 18, 48 N. W. Rep. 432; *Fairley v. Smith*, 87 N. Car. 367, 42 Am. Rep. 522.

⁴ *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 489, 90 Am. Dec. 252; *Cleveland, etc., R. Co. v. Perkins*, 17 Mich. 296, and see *Finnerstein's Champagne*, 3 Wall. 145.

⁵ *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202.

lead them into any gross mistake. If an article has no market value, its value may be shown by proof of its utility and other elements properly entering into an estimate of value, together with the opinions of witnesses as to its value.¹

§ 213. **Opinions received from necessity.**—It does not admit of doubt that the leading case on this subject is *Hardy v. Merrill*.² The following extract from the opinion in that case is a fitting introduction to this sub-topic: “But if a general rule will comfort any who insist upon excluding and suppressing truth, unless the expression of the truth be restrained within the confines of a legal rule, standard or proposition, let them be content to adopt a formula like this: *Opinions of witnesses derived from observation are admissible in evidence, when, from the nature of the subject under investigation, no better evidence can be obtained.* No harm can result from such a rule properly applied. It opens a door for the reception of important truths which would otherwise be excluded, while, at the same time, the tests of cross-examination, disclosing the witness’s means of knowledge, and his intelligence, judgment and honesty, restrain the force of the evidence within reasonable limits, by enabling the jury to form a due estimate of its weight and value. * * * How can a witness describe the weight of a horse, or his strength, or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of the step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions; because it is impossible to convey to the mind of another any adequate conception of the truth by a recital of visible and tangible appearances; because you can not, from the nature of the case, describe emotions, sentiments and affections, which are really too plain to admit

¹ *Bowers v. Horen*, 93 Mich. 420, 53 etc., *R. Co. v. Chapman*, 38 Kan. 307, N. W. Rep. 535, 32 Am. St. Rep. 513; 16 Pac. Rep. 695. See *Dunlap v. Snyder*, 17 Barb. 561.
² *Hardy v. Merrill*, 56 N. H. 227, 22 846, 11 Am. St. Rep. 388; St. Louis, Am. Rep. 441.

of concealment, but, at the same time, incapable of description, the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person: 'He seemed to be frightened;' 'he was greatly excited;' 'he was much confused;' 'he was angry.' All these emotions are expressed to the observer by appearance of the countenance, the eye and the general manner and bearing of the individual." Among the many rulings on this general subject the following may be noted: A non-expert may give his opinion as to whether another appeared sick or well, in good or in bad health,¹ as to whether he appeared feeble and unable to work.² So he may testify as to whether he observed in another the manifestations of joy, despondency, fright, intoxication, friendliness or hostility.³ If the opinion which it is

¹ *Smalley v. City of Appleton*, 70 Wis. 340, 35 N. W. Rep. 729; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. Rep. 364, 52 Am. Rep. 653; *Bennett v. Fail*, 26 Ala. 605; *Wilkinson v. Moseley*, 30 Ala. 562; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. Rep. 164; *People v. Monteith*, 73 Cal. 7, 14 Pac. Rep. 373; *Parker v. Boston Steamboat Co.*, 109 Mass. 449; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401. A non-expert may testify as to whether a horse appeared well and free from disease, but he can not testify as to whether it had the heaves. *Spear v. Richardson*, 34 N. H. 428.

² *Winter v. Central Iowa R. Co.*, 74 Iowa 448, 38 N. W. Rep. 154; *Stone v. Moore*, 83 Iowa 186, 49 N. W. Rep. 76.

³ *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547; *Blake v. People*, 73 N. Y. 586; *People v. Eastwood*, 14 N. Y. 562; *People v. Pakenham*, 115 N. Y. 200, 21 N. E. Rep. 1035; *Brownell v. People*, 38 Mich. 732; *Darling v. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *McKillop v. Duluth St. R.*

Co., 53 Minn. 532, 55 N. W. Rep. 739; *Culver v. Dwight*, 6 Gray 444; *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *State v. James*, 31 S. Car. 218, 9 S. E. Rep. 844. In the case of *Hardy v. Merrill*, 56 N. H. 227, already quoted from in the text, it is further said: "A man is tried for the murder of his wife. It is material to know how his mind was affected when he was first informed of her death. A witness, who says he told the prisoner of it, is asked how the prisoner was affected. The answer is, 'He was very much overcome,' or 'I thought he was deeply affected,' or, perhaps, 'The news did not disturb him at all,' or 'He showed no signs of grief,' or, 'I saw no indications of sorrow,' or, 'He seemed depressed and gloomy.' Did anybody ever object to such evidence? and if any objection was ever made on the ground that it was a matter of opinion, was the objection ever sustained?" In a breach of promise case, where the witness had lived in the house with the plaintiff, as a member of the same family, it was held proper to ask the witness whether

sought to have the witness express is based on multifarious facts (the right to sum up those facts resting on the ground of necessity), the witness should be first required to state, so far as possible, the facts upon which he bases his opinion.¹ Witnesses may be called on to express an opinion as to the identity of persons and things, and to give their judgment as

the plaintiff was sincerely attached to the defendant. The court said: "There are a thousand nameless things, indicating the existence and degree of the tender passion, which language can not specify. The opinion of witnesses, on this subject, must be derived from a series of instances passing under their observation, which yet they never could detail to a jury." *McKee v. Nelson*, 4 Cowen 355, 15 Am. Dec. 384. In *Clary v. Clary*, 2 Ired. L. 78, Gaston, J., speaking for the court, said: "In regard to questions respecting the temper in which words have been spoken or acts done, were they said or done kindly or rudely, in good humor or in anger, in jest or in earnest? What answer can be made to these inquiries, if the observer is not permitted to state his impression or belief? Must a *fac-simile* be attempted, so as to bring before the jury the very tone, look, gesture and manner, and let them collect therefrom the disposition of the speaker?" To the same effect, *Powers v. State*, 23 Tex. App. 42, 5 S. W. Rep. 153; *Raisler v. Springer*, 38 Ala. 703. In *Whittier v. Town of Franklin*, 46 N. H. 23, 88 Am. Dec. 185, it was held competent for a witness to testify that a horse did not appear frightened, but appeared to be sulky. *Quere*: Can a witness express an opinion that another person was feigning illness? *Enos v. St. Paul Fire & M. Ins. Co.*, 4 S. D. 639, 57 N. W. Rep. 919, 46 Am. St. Rep. 796. In *Wright v. City of*

Fort Howard, 60 Wis. 119, 50 Am. Rep. 350, 18 N. W. Rep. 750, this question was asked the plaintiff: "What injury are you suffering from now in consequence of that fall?" Held proper. The court said: "Where a plaintiff sues for a personal injury and is a witness in his own behalf, and his pain, suffering, or internal condition is pertinent to the issue and perceptible to his senses, a question put to such party eliciting a description of such pain, suffering or condition, and not necessarily requiring scientific skill or knowledge, is a question calling for facts and not mere opinion." In *Creed v. Hartman*, 8 Bosw. 123, the plaintiff's counsel said to her, while she was upon the stand: "State to the jury the effect of that injury upon you, and how your situation is." It was held that this was admissible, as she was simply called upon to state "facts of which she, in some respects, could alone be fully apprised, and of all was best apprised."

¹*Foster's Executors v. Dickerson*, 64 Vt. 233, 24 Atl. Rep. 253; *Stewart v. Redditt*, 3 Md. 67; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. Rep. 364, 52 Am. Rep. 653; *Stephenson v. State*, 110 Ind. 358, 11 N. E. Rep. 360; 59 Am. Rep. 216; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. Rep. 725; *Morse v. State*, 6 Conn. 9; *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. Rep. 1003.

to the correspondence between boots and footprints,¹ and to state whether certain hair was human hair.² A different rule would doubtless prevail, where the witness is a non-expert, in cases where the objects can be produced in court.³ The necessity for receiving opinion evidence on occasion is strongly exemplified in cases where it is necessary to examine witnesses as to sound, distance, weight, time, smell, heat, darkness, etc.⁴ In the well considered case of *Com. v. Sturtivant*,⁵ it was held that a witness who had observed an elongated blood-stain, upon a wall, might testify to his opinion as to the direction from which the blood moved, although he had never made any experiments of that kind.⁶ Where, immediately after the collision of two boats, a person looked at their condition, he was permitted to testify to the impression made upon his mind as to the position in which they came together.⁷ In a New York case,⁸ the question was asked a witness: "How did the driver drive from the time he left Pawtucket until he got to this railroad crossing?" The witness answered, "Well, he had his horses under pretty good control, and he seemed to drive carefully." Held competent. In a California case,⁹ it was held proper to ask a witness, who was upon the same car

¹ *Com. v. Pope*, 103 Mass. 440; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Clark v. State*, 28 Tex. Cr. App. 189, 26 S. W. Rep. 68, 19 Am. St. Rep. 817; *Bunn v. Timberlake*, 104 Ala. 263, 16 So. Rep. 97.

² *Com. v. Dorsey*, 103 Mass. 412.

³ *Sprague v. Atlee*, 81 Iowa 1, 46 N. W. Rep. 756; *Knoll v. State*, 55 Wis. 249, 42 Am. Rep. 704.

⁴ *Hachett v. Boston, etc., R. Co.*, 35 N. H. 390; *Stephenson v. State*, 110 Ind. 358, 11 N. E. Rep. 360, 59 Am. Rep. 216; *Ward v. Charleston City R. Co.*, 19 S. Car. 521, 45 Am. Rep. 794; *Snyder v. Witwer*, 82 Iowa 652, 48 N. W. Rep. 1046. See *State v. Donnelly*, 69 Iowa 705, 27 N. W. Rep. 369, 58 Am. Rep. 234.

⁵ *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

⁶ See further as to direction of blows or force, *Steamboat Clipper v. Logan*, 18 Ohio 375; *Hopt v. Utah*, 120 U. S. 430, 7 Supt. Ct. Rep. 614; *State v. Rainsbarger*, 71 Iowa 746, 31 N. W. Rep. 865. A non-expert may be permitted to express an opinion that a stain which he saw and which can not be produced in court was a blood stain. *People v. Deacons*, 109 N. Y. 374, 16 N. E. Rep. 676; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636.

⁷ *Patrick v. Steamboat J. Q. Adams*, 19 Mo. 73.

⁸ *Wilson v. N. Y., etc., R. Co.*, 18 R. I. 598, 29 Atl. Rep. 300.

⁹ *Healy v. Vistula, etc., R. Co.*, 101 Cal. 585, 36 Pac. Rep. 125.

as the plaintiff when she received her injury: "Under the circumstances, was it possible for an ordinary person, sitting in the position Mrs. Healy was sitting in, to stand the force of the jars, and still retain her seat upon the car?" The court said: "The border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness. Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words."

§ 214. Non-expert evidence upon the subject of sanity.—But little remains to be said upon this subject. Many of the decisions cited in the preceding section are applicable here. It has been many times ruled that if a non-expert states that he has had an opportunity to observe, and has observed, the mental condition of another, he may, after stating the facts within his knowledge as fully as possible, express an opinion upon his sanity.¹

§ 214a. Limitations upon the competency of non-expert opinion evidence.—Negatives are difficult to prove, and as a result, where the facts are such as to address themselves directly to the faculties of a witness, he may be permitted to express

¹ Connecticut, etc., Insurance Co. v. 498; Carr v. State, 24 Tex. App. 562, Lathrop, 111 U. S. 612, 4 Sup. Ct. Rep. 7 S. W. Rep. 328, 5 Am. St. Rep. 905; 533; Hardy v. Merrill, 56 N. H. 227, 22 State v. Lewis, 20 Nev. 333, 22 Pac. Am. Rep. 441; Foster's Executors v. Rep. 241, or may express an opinion that he was childish. Potts v. House, Dickerson, 64 Vt. 233, 24 Atl. Rep. 253; 6 Ga. 324, 50 Am. Dec. 329; or that Paine v. Aldrich, 133 N. Y. 544, 30 N. E. Rep. 725; Mull v. Carr, 5 Ind. App. 491, 32 N. E. Rep. 591; Baughman v. he was incapable of transacting business. Stewart v. Spedden, 5 Md. 433. Baughman, 32 Kan. 538, 4 Pac. Rep. In Keyser v. Chicago, etc., R. Co., 66 1003; Holcomb v. State, 41 Tex. 125; Mich. 390, 33 N. W. Rep. 867, it was McClackey v. State, 5 Tex. App. 320; held competent to ask a witness, who Territory v. Hart, 7 Mont. 489, 17 Pac. was well acquainted with a certain Rep. 718; Potts v. House, 6 Ga. 324, 50 child, as to whether he was an ordi- Am. Dec. 329. So a witness may testify, narily bright child. In Sprague v. after a proper foundation has been Atlee, 81 Iowa 1, 46 N. W. Rep. 756, laid, as to whether a person knew it was held that an objection to a right from wrong. Pflueger v. State, like question was properly sustained, 46 Neb. 493, 64 N. W. Rep. 1094; where the child had been on the stand United States v. Guiteau, 1 Mackey and fully examined.

an opinion by a negative answer. Thus, in a Minnesota case,¹ it was held error to exclude an answer to the following question: "State whether or not any person or persons acting for you, as your agent, or otherwise, had the right or authority to make the sale of a threshing machine or any piece of machinery, without first having submitted a printed order for the same?"² But in cases where the fact sought to be proved is affirmative in its nature, and is made up of resultant facts which can reasonably be shown upon the trial, the court will not accept the deduction of the witness.³ In the carefully considered case of *State v. Williams*,⁴ it is said: "We think the limit may be drawn without any difficulty, and consistently with the habitual practice of courts. Whenever the opinion of the witness upon such a question, or one coming under the same rule, is the direct result of observation, through the senses, the evidence is admissible; * * * but if the opinion is the result of reasoning from collateral facts, it is inadmissible. * * * In such case the tribunal is as competent to reason out the resultant opinion as the witness is; and, by the theory of the law, it alone is competent to do so. To allow any influence to the opinion of the witness would be of necessity to substitute him to the function of the tribunal." The cases which have been cited in the section immediately preceding, in which affirmative conclusions based on primary facts have been held competent, are cases involving questions like insanity, where the facts can not be shown; but even in those cases, as we have seen, the party offering the evidence must show the facts as fully as possible.

¹ *Peerless Machine Co. v. Gates*, 61 Minn. 124, 63 N. W. Rep. 260.

² See *Over v. Schiffing*, 102 Ind. 191, 26 N. E. Rep. 91; *Walker v. Lake Shore, etc., R. Co.*, 104 Mich. 606, 62 N. W. Rep. 1032.

³ *Simpson v. Smith*, 27 Kan. 565; *Hite v. Stimmell*, 45 Kan. 469, 25 Pac. Rep. 852; *Evansville, etc., R. Co. v. Fitzpatrick*, 10 Ind. 120; *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E.

Rep. 725. For an interesting discussion of this question, see the case of *Boyle v. State*, 105 Ind. 469, 5 N. E. Rep. 203, 55 Am. Rep. 218, a liberal extract from which will be found in note 3, p. 251, of this work. It was held in *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. Rep. 349, that collective facts may be shown on cross-examination.

⁴ *State v. Williams*, 67 N. Car. 12.

§ 215. **Speed of trains, etc.**—Any intelligent man who is accustomed to observe moving objects may testify as to the rate of speed at which a train or other object which he was watching was proceeding.¹

§ 216. **Subscribing witnesses.**—Subscribing witnesses to a will, being regarded as the plighted witnesses to the instrument they attest, may be called on to express an opinion as to the mental condition of the testator, although no foundation is laid.²

§ 217. **Modes of proving handwriting.**—There are two, and in most jurisdictions three, ways of proving handwriting. The direct and simplest evidence of such a fact is by the testimony of a person who saw the paper or signature written, and who swears to its identity. The second method of proving that fact is by the testimony of a witness who, although he did not see the person whose writing is in question write, is nevertheless familiar with his handwriting; and the third method is the purely expert method of proving the handwriting by comparison. There is no occasion for discussing the first method.

§ 218. **Extent of familiarity with handwriting.**—There is no dispute upon the proposition that if a witness testifies that he has seen a person write, and that he knows his writing, he is a competent witness upon that question.³ Indeed, the authorities seem to be sufficiently lax on the subject to admit the witness's opinion or belief based merely on having seen the person write, although the witness does not swear that he knows the person's handwriting.⁴ The knowledge of another's writing

¹ Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Guggenheim v. Lake Shore, etc., R. Co., 66 Mich. 150, 33 N. W. Rep. 161; Missouri, etc., R. Co. v. Hildebrand, 52 Kan. 248, 34 Pac. Rep. 738.

² Rapalje's Law of Witnesses, § 291, and cases there cited.

³ Karr v. State, 106 Ala. 1, 17 So. Rep.

328; Smith v. Walton, 8 Gill 77; Ede-
len v. Gough, 8 Gill 87.

⁴ Garrells v. Alexander, 4 Esp. 37; Talbott v. Hedge, 5 Ind. App. 555, 32 N. E. Rep. 788; 1 Greenl. on Ev., § 577; Rogers' Expert Testimony, 286. In Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330, it was held that a person might testify to a signature

need not be acquired in an ocular manner. Upon this subject Mr. Greenleaf says: "The second mode is, from having seen letters, or other documents, purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them; or acted upon them as his, the party having known and acquiesced in such acts, founded upon their supposed genuineness; or, by such adoption of them into the ordinary business transactions of life as induces a reasonable presumption of their being his own writings; evidence of the identity of the party being of course added *aliunde*, if, the witness be not personally acquainted with him."¹ If a witness has become familiar with the handwriting of another by the receipt of writings which the witness knows to be genuine, and which writings he has in his possession, there is no objection to his refreshing his memory by an inspection of them, and, even the common law authorities hold that he may do this while holding the genuine and the disputed writings in juxtaposition.²

§ 219. **Comparison of handwritings.**—The proposition to compare two writings, neither of which is known to the wit-

who had only seen the supposed writer sign his initials. *Jackson v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330. If the witness is unfamiliar with the person's signature, except by seeing the person write for the express purpose of proving or disproving such signature, the witness is not qualified. *Stranger v. Searle*, 1 Esp. 14; *Reese v. Reese*, 90 Pa. St. 89, 35 Am. Rep. 634; *Territory v. O'Hare*, 1 N. Dak. 30, 44 N. W. Rep. 1003.

¹ 1 Greenl. on Ev., § 577; *Johnson v. Daverne*, 19 Johns. 134, 10 Am. Dec. 198; *Titford v. Knott*, 2 Johns. Cas. 211; *Tuttle v. Rainey*, 98 N. Car. 513, 4 S. E. Rep. 475; *Berg v. Peterson*, 49 Minn. 420, 52 N. W. Rep. 37; *Reyburn v. Belotti*, 10 Mo. 597; *Tucker v. Kellogg*, 8 Utah 11, 28 Pac. Rep. 870.

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The receipt of one or more letters purporting to be written by a certain person, without anything further to show that they emanated from him, will not qualify the person receiving them to express an opinion as to the handwriting of the person from whom the letters purport to come. *Cunningham v. Hudson Riv. Bank*, 21 Wend. 556; *Pinkham v. Cockell*, 77 Mich. 265, 43 N. W. Rep. 921; *Putnam v. Wadley*, 40 Ill. 346; *Brant v. Dennison*, (Pa. St.) 5 Atl. Rep. 869; *Talbott v. Hedge*, 5 Ind. App. 555, 32 N. E. Rep. 788.

² A telegram in an agreed cipher identifies itself. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 3 N. E. Rep. 485, 53 Am. Rep. 221.

ness to be genuine, is quite a different one from the proposition just preceding. The common law did not recognize the right to make such comparisons, excepting where the antiquity of the writing was so great as to render it impossible, or, at least, difficult, to obtain witnesses familiar with it; the comparison in such a case being made with ancient writings which had been treated and preserved as authentic documents.¹ This rule was changed by statute in England.² The former exclusionary rule was based on the consideration of the difficulty in obtaining a standard, in that if a comparison was instituted between the writing in question and a supposed standard, it would be not impossible that the genuineness of the standard would be attacked by a comparison with another supposed standard, and further that a party might cause unfair specimens to be selected. According to many authorities in this country, a comparison can only be made of a disputed writing with another writing, where the latter is already a part of the record or evidence in the case and where its genuineness is admitted.³ In some of the states it is held that papers may be introduced solely for the purpose of comparison, if their genuineness is admitted.⁴ In a third class of states, the courts go

¹ *Burr v. Harper*, Holt's N. P. C. 420; 2 Phil. on Ev., (1849 ed.) 257; *Rowt's Admx. v. Kite's Admr.*, 1 Leigh 216; *Jackson v. Brooks*, 8 Wend. 426, 15 Wend. 111; *Strother v. Lucas*, 6 Peters 763; *Clark v. Wyatt*, 15 Ind. 271, 77 Am. Dec. 90. See Best on Ev., § 240.

² 17 and 18 V. C. 125, §§ 27, 103; 28 and 29 V. C. 18, C. 18.

³ *Rogers v. Tyley*, 144 Ill. 652, 32 N. E. Rep. 393; *White S. M. Co. v. Gordon*, 124 Ind. 495, 24 N. E. Rep. 1053; *Swales v. Grubbs*, 126 Ind. 106, 25 N. E. Rep. 877; *Randolph v. Loughlin*, 48 N. Y. 456; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538; *Yates v. Yates*, 76 N. Car. 142; *People v. Parker*, 67 Mich. 222, 34 N. W. Rep. 720, 11 Am. St. Rep. 578; *Moore v. United*

States, 91 U. S. 270; *Little v. Beazley*, 2 Ala. 703, 36 Am. Dec. 431. This rule was applied in *State v. Miller*, 47 Wis. 530, 3 N. W. Rep. 31, where the defendant was on trial for arson, and the state sought to compare a letter, written to the prosecuting witness, containing threats of arson, with a copy of the same letter, written by the defendant after his arrest, at the dictation of an officer.

⁴ *Ort v. Fowler*, 31 Kan. 478, 2 Pac. Rep. 580, 47 Am. Rep. 501; *Morrison v. Porter*, 35 Minn. 425, 29 N. W. Rep. 54, 59 Am. Rep. 331; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *Durnell v. Sowden*, 5 Utah 216, 14 Pac. Rep. 334; *Tucker v. Kellogg*, 8 Utah 11, 28 Pac. Rep. 870.

further than the courts of the states last mentioned, and admit other writings, for the purposes of comparison, not only where their genuineness is admitted but in cases where the proof of genuineness is strong and clear (in some of the cases it is said that the proof must establish the standard beyond a reasonable doubt.)¹ The still different view is taken in Pennsylvania and South Carolina that comparison of hands is not an original method of proof, but is only to be used as corroboratory evidence.²

§ 220. **Same subject.**—Although most of the states are committed to some definite rule concerning the reception of evidence of this character, it will not be amiss to consider the various rules above stated from the standpoint of principle. As to the first mentioned rule, that papers already in the case, and admittedly genuine, may be used, it would seem, granting that there is evidence of identity in the similarity of different specimens of handwriting, that there could be no possible objection to admitting expert evidence in that kind of a case, for, it is to be observed, the jury will make the comparison any way, as, indeed, they have a strict right to do under a relaxation of the common law,³ and they should therefore be aided by expert evidence. It was said by Lord Denman in an English case,⁴ decided in the year 1836: “There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied, to be so, no human power can prevent the jury from comparing them,

¹ *Com. v. Coe*, 115 Mass. 481; *State v. Thompson*, 80 Me. 194, 13 Atl. Rep. 892, 6 Am. St. Rep. 172; *State v. Hastings*, 53 N. H. 452; *Adams v. Field*, 21 Vt. 258; *Rowell v. Fuller's Estate*, 59 Vt. 688, 10 Atl. Rep. 853; *Mardes v. Meyers*, (Tex. Civ. App.) 28 S. W. Rep. 693; *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600; *Winch v. Norman*, 65 Iowa 186, 21 N. W. Rep. 511; *Sankey v. Cook*, 82 Iowa 125, 47 N. W. Rep. 1077; *Hanriot v. Sherwood*, 82 Va. 1.

² *McCorkle v. Binns*, 5 Binn. 340, 6 Am. Dec. 420; *Farmer's Bank v. Whitehill*, 10 S. & R. 110; *Benedict v. Flanagan*, 18 So. Car. 506, 44 Am. Rep. 583.

³ *Griffith v. Williams*, 1 Cr. & J. 47; *Doe v. Newton*, 1 Nev. & P. 4, 5 Ad. & Ell. 514; *Solita v. Yarrow*, 1 Mo. & R. 133; *Eaton v. Jervis*, 8 C. & P. 273.

⁴ *Doe v. Newton*, 1 Nev. & P. 4, 5 Ad. & Ell. 514.

with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can under the circumstances which can not be helped."¹ As to the second-mentioned rule, that papers admittedly genuine may be used as standards, it may be said that there can be no objection urged to this rule, so far as the standard is concerned, but there is a danger in having collateral papers put before the jury, which, although they might contain matter quite prejudicial to the cause of the party against whom they are produced, could not be explained. With regard to both of the rules already mentioned in this section, there has been some question as to who may make the admission of genuineness. One of the reasons assigned at common law for the exclusion of evidence of handwriting by comparison was the danger of fraud in the selection. But this difficulty could only arise from a wrong application of the rule, as where a trial court, as in a Missouri case, permitted the defendant, in a suit on a note, where he had pleaded *non est factum*, to call an expert to prove that the signature to the note and the signature to the plea were not the same.² In an Indiana case it is said: "The question arises, who shall make the admission? The appellee insists that if the maker of the papers admits the signatures to them to be genuine, this is an admission within the meaning of the rule. We think otherwise. The admission must be made by the party against whom the admission is sought to be used, whether he is or is not the maker of the paper. A claim that a signature is genuine by a party who seeks to use it is no admission at all."³ As to the third rule, permitting evidence to be introduced to establish the standard, it is to be observed that it is ordinarily open to the objection that a possibility can not be supported by a hy-

¹ Approved, *Williams v. Conger*, 125 U. S. 397, 8 Sup. Ct. Rep. 933; *Van Wyck v. McIntosh*, 14 N. Y. 439.

² *Springer v. Hall*, 83 Mo. 693, 53 Am. Rep. 598. In Massachusetts, where, as already shown, the standard may be proved by evidence, it is held that

signatures or handwriting executed *post litem motam* can not be used. *King v. Donohue*, 110 Mass. 155, 14 Am. Rep. 589; *Com. v. Allen*, 128 Mass. 46, 35 Am. Rep. 356.

³ *Shorb v. Kinzie*, 80 Ind. 500.

pothesis which itself rests on a possibility.¹ That is to say, if a witness goes upon the stand, and there is submitted to him a proposed standard of handwriting, and he, after examining it, testifies, from his recollection, that it is similar to the handwriting of the person whose writing is in question, that it is his handwriting, then the point stands thus: the proposed standard resembles the handwriting of such person, and therefore it is to be assumed that the genuine writing and the standard writing were written by the same person, and if it should further appear from the evidence of the witness that the standard writing and the writing in question resemble each other, the jury will be asked, first, to *infer* that the standard writing is the genuine writing of such person, and, second, to *infer* from that assumption that the writing in dispute was written by the person whom the party introducing the evidence claims that it was written by. Some of the cases cited as supporting this rule avoid this objection by requiring the evidence of the standard writing to be *direct*, and not opinion evidence, while others seek to avoid the objection by holding that the first inference may be treated as an established fact by the accumulation of evidence upon that point to an extent which practically puts the question out of the realm of controversy.

§ 221. Cross-examination of witness as to handwriting.—

It is a matter of serious question to what extent, if at all, the rule concerning collateral writings broadens on the cross-examination. It has been held in a number of cases that it is not competent to submit a forged signature to a witness on cross-examination, for the purpose of testing his expert character,² and in two carefully considered Indiana cases it was held that other papers not already in evidence could not be submitted to him, because, if his testimony upon the collateral point was adverse to the party calling him, the latter might

¹ *Winch v. Norman*, 65 Iowa 186, 21 91 Mo. 399, 3 S. W. Rep. 876, 60 Am. N. W. Rep. 511; *ante*, § 52. Rep. 258; *Massey v. Bank*, 104 Ill. 327;

² *Gaunt v. Harkness*, 53 Kan. 405, 36 Tyler v. Todd, 36 Conn. 218. Pac. Rep. 739; *Rose v. First Nat. Bank*,

with equal right insist upon rebutting the collateral issue.¹ A close question exists as to whether the exclusionary rule is changed, as to the introduction of collateral documents, where a party to the suit, who has denied his signature to a writing on the main examination, is examined on cross-examination as to collateral signatures purporting to be his, if there is no one to be prejudiced by his admission but himself. It would seem, however, in jurisdictions where the rule is to admit in evidence, for the purpose of comparison, only such writings as are admittedly genuine and are already in evidence, that such a cross-examination would not be proper. If he voluntarily admits his signature, not as a witness but as a party, then, if it be a paper in the case, it may well be treated as a standard, but it is quite within the realm of possibility that an honest witness might be morally coerced by his oath, the signature to the collateral paper being similar to his own, to give it as his judgment that it was his own, while as a party merely he would not be so satisfied as to feel justified in making the admission. It is to be recollected that the effort is to establish a standard, and if that be uncertain, it is in vain that a superstructure of evidence is built upon it. Shakespeare, whose powerful mind ran the whole gamut of human experience, makes one of his characters in *Twelfth Night* say: "I can write very like my lady, your niece; on a forgotten matter we can hardly make distinction of our hands."² Passing the above question by, however, it may be said that it is competent for the court in its discretion, upon cross-examination, to require a witness, who has denied on his direct examination that a signature is his, to write his name.³

¹ *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. Rep. 336; *Tucker v. Hyatt*, 144 Ind. 635, 41 N. E. Rep. 1047, 43 N. E. Rep. 872.

² Mr. Best, in his work on evidence, § 247, mentions an instance in which a bank clerk swore distinctly that his

signature was attached to a note which was a forgery throughout, whereas he spoke hesitatingly in regard to his genuine superscription.

³ *Smith v. King*, 62 Conn. 515, 26 Atl. Rep. 1059.

§ 222. **Secondary evidence of standard of handwriting.**—It has been held in several cases that a letter-press copy of a writing can not be used as a standard because the mechanical process of copying spreads the ink and blots the letters, thereby affecting somewhat the general appearance of the writing.¹ It would probably be more correct to state that such a copy is not primary evidence. Although photographic copies of a writing are ordinarily secondary evidence,² yet where the original signature is present, it is held that a magnified photographic copy of it may be primary evidence, for the purpose of more plainly exhibiting the characteristics of the writing.³

§ 223. **Qualification of expert as to handwriting.**—While it requires an especial knowledge to enable a witness to testify from an examination of a disputed writing that it is the handwriting of a particular person, yet that knowledge is based on recognition. Indeed, it is conceivable that a totally unlettered person might be a competent witness on this question. But it is in the comparison of two specimens of handwriting, which the witness takes up without any *a-priori* opinion as to their particular characteristics, that the function of the expert is exhibited. Upon this latter point it is to be observed that there are experts and there are experts. If a witness goes upon the stand, where such a question is raised, and testifies that it has been his business habit, to make comparisons of writings, he is legally qualified to testify.⁴ Authorities can doubtless be found⁵ which state the rule of qualification in such man-

¹ *Com. v. Eastman*, 1 Cush. 189, 48 Am. Dec. 596; *Cohen v. Teller*, 93 Pa. St. 123. But the genuineness of the letter-press copy may be proved by testimony where that fact is in question. *Com. v. Jeffries*, 7 Allen 548, 83 Am. Dec. 712.

² *Ante*, § 82.

³ *Marcy v. Barnes*, 16 Gray 161, 77 Am. Dec. 405; *Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.

⁴ *Ort v. Fowler*, 31 Kan. 478, 2 Pac. Rep. 580, 47 Am. Rep. 501.

⁵ It is the writer's observation that while the testimony of the thoroughgoing expert upon handwriting is satisfactory, yet that the testimony of ordinary experts, such as cashiers, etc., is very unsatisfactory. In the case of a crude forgery, the jury will appreciate the difference between the false and the true as readily as the expert, while in cases of skillful forgeries, the ordinary expert is deceived because of the similitude between the genuine writing and the forgery, when

ner as to admit as experts persons having much familiarity with handwriting, although they never instituted comparisons between different specimens.

the truth is that, if it be assumed that the act was done by an expert forger, similitude—at least to the superficial observation—is a condition which is always present. The real expert in handwriting brings to his aid the microscope or the camera to reveal the fact that the writing has been traced, or that there has been other pains-

taking effort in its execution; and he also, by a study of many of the genuine specimens of the handwriting, if they can be procured, endeavors to become acquainted with the characteristics of the handwriting which lie below any mere question of similitude.

CHAPTER VIII.

HEARSAY.

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§ 223a. Scope of discussion.—Many writers upon the law of evidence treat important branches of the subject as exceptions to the general rule excluding hearsay. It is the writer's purpose to treat these exceptions in other portions of the work, and to use this chapter to enforce the principle of the law of evidence relative to hearsay in the strict sense of the term. There are but few exceptions to the general rule excluding hearsay evidence, but these exceptions are as firmly established as the rule itself. Much of the evidence which is often spoken of falling within the exceptions to the rule excluding hearsay is really original evidence. As this proposition will find abundant illustration in the chapter on *res gestæ*, a single illustration must now suffice. If, for instance, a question existed as to whether a person had acted prudently or in good faith, it would be clear that the information on which he acted, whether true or false, would be original and mate-

rial evidence,¹ but if the question was as to the existence of a specific fact, it would be clearly incompetent to show the result of inquiries among those who would be likely to possess information upon the subject.²

§ 224. **Definition of hearsay evidence.**—Mr. Phillips says: “The term, hearsay evidence, is used with reference both to that which is written, and that which is spoken. But, in its legal sense, it is confined to that kind of evidence which does not derive its effect solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person, from whom the witness may have received his information.”³ The general rule of evidence is that testimony must be given on oath by persons speaking to matters within their own knowledge, and liable to be tested by cross-examination.⁴ As was said by Justice Buller, in an English case:⁵ “The true line for courts to adhere to is, whenever evidence, not on oath, has been repeatedly received and sanctioned by judicial determination, it shall be allowed; but beyond that, the rule that no evidence shall be admitted but what is upon oath, shall be observed.”⁶ In a California case,⁷ the court stated that “hearsay evidence is a species of derivative evidence, which is offered for the purpose of establishing some specific fact in a case, and rests on the veracity and competency of some other person than the witness. Such

¹ *Phelps v. Foot*, 1 Conn. 387; *Hurlburt v. Hurlburt's Estate*, 63 Vt. 667, 22 Atl. Rep. 850.

² *Hurlburt v. Hurlburt's Estate*, 63 Vt. 667, 22 Atl. Rep. 850.

³ 1 Phil. on Ev. (1849 ed.), 185; *Mima Queen v. Hepburn*, 7 Cranch 290; *Hopt v. People*, 110 U. S. 574, 4 Sup. Ct. Rep. 202.

⁴ *Sturla v. Freccia*, L. R. 5 App. Cas. 623, L. R. 12 Ch. Div. 411. In 3 Bacon's Abridgement, 629, it is said: “It seems agreed that what another has been heard to say is no evidence, because the party was not on oath; also, because the party who is

affected thereby had not an opportunity of cross-examining; but such speeches or discussions may be made use of by way of inducement or illustration of what is properly evidence. Also what a witness hath been heard to say at another time may be given in evidence, in order either to invalidate or confirm the testimony to be given in court.”

⁵ *Rex v. Eriswell*, 3 T. R. 707.

⁶ Quoted approvingly in *Ellicott v. Pearl*, 10 Pet. 412.

⁷ *Smith v. Whittier*, 95 Cal. 279, 30 Pac. Rep. 529.

testimony is excluded whenever it appears that a higher degree of evidence of that fact can be obtained by the production of the person from whom the evidence offered was derived; but whenever the testimony of such person is of no higher degree in establishing the fact to be shown," the evidence is competent.

§ 225. **Hearsay should always be excluded.**—In the case of *Mima Queen v. Hepburn*,¹ it was said by Chief Justice Marshall, in pronouncing the opinion of the court: "This court can not perceive any legal distinction between the assertion of this, and of any other right, which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted. The rule, then, which the court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others where rights may depend on facts which happened many years past. It was very justly observed by a very great judge, 'that all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty and our property are all concerned in the support of those rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.' One of those rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, continue to support the rule that hearsay evidence is totally inadmissible. To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. There are also matters of general and public history which may be received without that full proof which is neces-

¹ *Mima Queen v. Hepburn*, 7 Cranch 290.

sary for the establishment of a private fact. It will be necessary only to examine the principles on which these exceptions are founded to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact,¹ because the eye-witnesses to it are dead; but if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all. If the circumstance that the eye-witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained."

§ 226. Circumstances giving credit to hearsay do not render it admissible.—The fact that a declaration is made under circumstances which render it probable that it is true will not suffice to render such declaration competent, if the fact be that the declaration is hearsay, and the proposed testimony does not fall within any of the recognized exceptions to the excluding rule. Thus, it was held in one case that it was incompetent to show that the mistress of the defendant had warned the deceased, on the night of the homicide, as to the purpose of the defendant.² So it has been held a number of times, where the defendant was on trial for larceny, that it could not be shown by the prosecuting witness what description he gave the officer of the thief, for the purpose of showing that he described the defendant.³ In still another case, where a witness had testified that

¹ As supporting this proposition, see *Rex v. Inhabitants*, 8 East 539; *Rex v. Inhabitants of Erith*, 3 T. R. 721; *Bradshaw v. Com.*, 10 Bush 576; *Chouteau v. Searcy*, 8 Mo. 733; *Felder v. State*, 23 Tex. App. 477, 5 S. W. Rep. 145, 59 Am. Rep. 777.

² *Chilton v. State*, 105 Ala. 98, 16 So. Rep. 797; *Com. v. Fagan*, 108 Mass. 471; *People v. Johnson*, 91 Cal. 265, 27 Pac. Rep. 663; *People v. McNamara*, 94 Cal. 509, 29 Pac. Rep. 953.

³ *Hairston v. State*, 54 Miss. 689, 10

he saw a pistol handed to the accused by his brother, and an effort had been made to impeach the witness, it was held incompetent to prove that the brother, whom it was claimed had handed the pistol to accused, had stated that he had done so before the shooting began.¹

§ 227. **Admissions of guilt by third persons.**—A defendant in a criminal case can not be permitted to show that a third person has admitted that he had committed the crime.² To permit such a statement to go in evidence would be not only to admit pure hearsay, but the establishment of such a doctrine would cause courts of justice to be imposed upon, by reason of the fact that it would often happen that a friend of the defendant would be willing, by his admission, to incur some degree of jeopardy, in order to relieve the defendant of his present pressing jeopardy.

§ 228. **Acts and declarations of third person tending to prove that he is guilty person.**—It has been ruled in a number of cases that it is not competent for a defendant, who is on trial charged with the commission of crime, to prove that a third person had threatened to commit the crime.³ It was held in a

¹ *State v. Guillory*, 45 La. Ann. 31, 12 So. Rep. 314.

² *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. Rep. 783; *Com. v. Chabcock*, 1 Mass. 144; *Com. v. Sanders*, 14 Gray 394, 77 Am. Dec. 335; *Com. v. Goddard*, 2 Allen 148; *Benton v. Starr*, 58 Conn. 285, 20 Atl. Rep. 450; *State v. Hack*, 118 Mo. 92, 23 S. W. Rep. 1089; *Davis v. Com.*, 95 Ky. 19, 23 S. W. Rep. 585, 44 Am. St. Rep. 201; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *United States v. Mulholland*, 50 Fed. Rep. 413; *Owensby v. State*, 82 Ala. 63, 2 So. Rep. 764; *West v. State*, 76 Ala. 98; *Snow v. State*, 58 Ala. 372; *Smith v. State*, 9 Ala. 990; *Bowen v. State*, 3 Tex. App. 617; *Rhea v. State*, 10 Yerg. 258; *State v. White*, 68 N. Car. 158; *Daniel v. State*, 65 Ga. 199; *Kelly v. State*, 82 Ga. 441, 9 S. E. Rep. 171; *State v. West*, 45 La. Ann. 14 and 928, 13 So. Rep. 173; *State v. Smith*, 35 Kan. 618, 11 Pac. Rep. 908; *State v. Fletcher*, 24 Ore. 295, 33 Pac. Rep. 575; *People v. Hall*, 94 Cal. 595, 30 Pac. Rep. 7. See *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. Rep. 961.

³ *United States v. Mulholland*, 50 Fed. Rep. 413; *Crookham v. State*, 5 W. Va. 510; *State v. Duncan*, 6 Ired. L. 236; *Alston v. State*, 63 Ala. 178; *State v. Davis*, 77 N. Car. 483; *Carlton v. People*, 150 Ill. 181, 37 N. E. Rep. 244, 41 Am. St. Rep. 346; *Rhea v. State*, 10 Yerg. 258; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *State v. Beaudet*, 53 Conn. 536, 55 Am. Rep. 155; *Sible v. State*, 3 Heisk. 137; *Walker v. State*,

West Virginia case,¹ that it was incompetent to prove in such a case the fact of threats by a third person, even when the proffered testimony was accompanied by an offer to prove that such third person had fled the country immediately after the crime was committed. The reason assigned for these rulings is that such evidence is too remote from the inquiry before the jury and has no legal tendency to establish the innocence of the defendant.² Such evidence does not carry the mind to any definite conclusion; it leads nowhere. It is believed, however, that evidence of the character mentioned would be competent if there were some evidence tending directly to prove the guilt of such third person; it is one thing to affirm that a defendant shall not introduce evidence which merely suggests a possibility that a third person has committed the crime; and it would be a very different thing to deny to a defendant who had introduced evidence tending to show that a third person had committed the crime, the right to show an antecedent disposition on the part of such third person to commit such crime. In such a case there would be proof of the principal fact that he had committed the crime, and his prior declaration would be a part of the *res gestæ*.³

§ 229. Admissions of injured party not competent in criminal case.—Even the admission of the person who has sustained the injury can not be used by the defendant, except by way of impeachment, where the defendant is on trial charged with the commission of crime,⁴ for the state is not bound by the mere hearsay statement of the injured party.

6 Tex. App. 576; Woolfolk v. State, 85 Ga. 69, 11 S. E. Rep. 814.

¹ Crookham v. State, 5 W. Va. 510.

² Carlton v. People, 150 Ill. 181, 37 N. E. Rep. 244, 41 Am. St. Rep. 346; Alston v. State, 63 Ala. 178; State v. Davis, 77 N. Car. 483; Walker v. State, 6 Tex. App. 576; State v. Duncan, 6 Ired. L. 236.

³ Com. v. Trefethen, 157 Mass. 180,

31 N. E. Rep. 961; Woolfolk v. State, 85 Ga. 69, 11 S. E. Rep. 814; Walker v. State, 6 Tex. App. 576; Hensley v. State, 9 Humph. 243; State v. Davis, 77 N. Car. 483. See *post*, § 276, 278.

⁴ Com. v. Densmore, 12 Allen 535; Com. v. Sanders, 14 Gray 394, 77 Am. Dec. 335; State v. Molisse, 38 La. Ann. 381, 58 Am. Rep. 181.

§ 230. **The rule is the same where the injured party is dead.**—As we have already seen, in the chapter on declarations, the fact that death has deprived a party of evidence will not render the declarations of the person deceased competent except in certain cases constituting exceptions to the rule excluding hearsay. It only remains to state, so far as this section is concerned, that in a criminal case the mere statement of the injured person exculpating the defendant is not evidence, notwithstanding the fact that the decease of such person may have deprived the defendant of the power to prove the fact to which such statement related.¹ In a Massachusetts case,² the defendant was tried for embezzlement. The defendant offered to prove that subsequent to the alleged embezzlement the person who the indictment alleged owned the property, and who had thereafter died, had stated that the defendant had an interest in the property. In ruling as to the competency of this testimony the court said: "The evidence of the declarations and statements of Allen Mason were mere hearsay, and for that cause rightly rejected."³ It makes no difference that he was dead and that therefore his testimony could not be obtained."

§ 231. **Self-serving acts of party.**—For the same reason that the self-serving declarations of a party are incompetent as evidence in his favor, so his self-serving acts are also excluded. In a Georgia case,⁴ it was held that a party could not show his manifestation of surprise when he learned that he was regarded as a partner. It has been held in a number of criminal cases that the refusal of the defendant to flee could not be shown, because it was an act which, if adduced in his favor, must be pronounced a self-serving act.⁵

¹ *Com. v. Sanders*, 14 Gray 394, 77 Am. Dec. 335; *Com. v. Densmore*, 12 Allen 535; *People v. Hall*, 94 Cal. 595, 30 Pac. Rep. 7.

² *Com. v. Sanders*, 14 Gray 394, 77 Am. Dec. 335.

³ 1 Greenl. Ev. § 124.

⁴ *Bowie v. Maddox*, 29 Ga. 285, 74 Am. Dec. 61.

⁵ *Com. v. Hersey*, 2 Allen 173; *State v. Wilkins*, 66 Vt. 1, 28 Atl. Rep. 323; *People v. Rathbun*, 21 Wend. 509; *Jordan v. State*, 79 Ala. 9, 1 So. Rep. 577; *Pate v. State*, 94 Ala. 14, 10 So. Rep. 665.

§ 232. *Res inter alios acta alteri nocere non debet.*—This maxim is translated by Broom, in his work on legal maxims, thus: "A transaction between two parties ought not to operate to the disadvantage of a third." This maxim, while of no certain import, has come into common use—its usual form being, "*Res inter alios acta.*" The rule is only of general, and not of universal application, and while the expression "*Res inter alios acta*" has become a part of the current coinage of legal literature—being used particularly with reference to hearsay evidence—there is much occasion for discrimination in its use.

§ 233. *Party offering hearsay evidence must show it within exception.*—The general rule being that hearsay evidence is incompetent, an objection to such evidence is *prima facie* valid, and imposes on the party offering the evidence the burden of showing that it is within one of the exceptions.¹

§ 234. *Probative force of hearsay if not objected to.*—In a Massachusetts case,² an interesting question was presented as to the probative force of two returns, which were introduced in evidence without objection. In each of them facts were stated which the law did not authorize the officer to state in his return. In disposing of the question the court said: "If the jury believed the statements to be true, they should make from them the reasonable necessary inferences of other facts, and with the facts explicitly stated and necessarily inferred, they should find a verdict for the plaintiffs. It is the ordinary case of something less than the best evidence, but of evidence admitted and to be dealt with by the jury. The return was the statement of a sworn officer, and the commissioner's certificate, although not required by statute to be indorsed upon the execution, was also a statement of a sworn officer, and no statute forbade him to put it upon the execution. Papers signed by trustworthy persons, if put in evidence before a jury, although not competent, if objected to, naturally tend to induce a belief

¹ Wallace v. Howard, (Tex. Civ. App.) 30 S. W. Rep. 711.

² Damon v. Carroll, 163 Mass. 404, 40 N. E. Rep. 185.

of the matters contained in them. Hearsay evidence usually is rejected because it lacks the corroboration of an oath or affirmation, and not because it has no natural tendency to induce belief. When hearsay evidence is incompetent, the reason for its exclusion is the same in principle as that which formerly excluded testimony from interested witnesses. It was thought that the effect of interest made it unsafe to consider the testimony of such witnesses, just as the lack of an oath made it unsafe to consider hearsay testimony. But it was always held that if testimony, incompetent by reason of the interest of a witness, was allowed to go before the jury, they might consider it as they would any other testimony [citing authorities]. Hearsay evidence is treated by Bentham as in the nature of secondary evidence.¹ It is admitted in Scotland. Upon some questions hearsay evidence is competent everywhere, as in questions of age and pedigree. In the case at bar the certificate and the return tend to show that the recognizance declared on was made in the same way, if with a less degree of certainty, that the record of the Dorchester municipal court tends to show that the debtor caused to be given notice of his desire to take the oath for the relief of poor debtors, and the other matters there stated as facts."

§ 235. **General reputation.**—This subject will be discussed in another connection.² A reference to that chapter will disclose the extent that courts have gone in accepting general reputation in lieu of direct evidence.

¹ See Whart. Ev., §§ 170, 172.

² *Post*, Chapter X.

CHAPTER IX.

RES GESTÆ.

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| <p>§ 284. Certain analogous <i>res gestæ</i> topics suggested but considered elsewhere.</p> <p>285. A limitation upon declarations where mental state is involved.</p> <p>286. The <i>res gestæ</i> in business transactions.</p> <p>287. The <i>res gestæ</i> in criminal cases.</p> <p>288. Declarations of grantor where fraud is charged.</p> | <p>§ 289. Declarations of person in possession in favor of himself or another.</p> <p>290. Declarations of by-standers.</p> <p>291. Matter of opinion.</p> <p>292. Principal fact must be established by direct proof.</p> <p>293. <i>Res gestæ</i> is primary.</p> <p>294. Duty of state to prove the whole of <i>res gestæ</i>.</p> <p>295. Certain <i>res gestæ</i> topics treated elsewhere.</p> |
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§ 236. **Meaning of term.**—This expression is not used in a technical sense in the Latin. Its singular form is *res gesta*. *Res acta* is another form of the term. The converse of this expression is *res inter alios acta*, which is used, although not with entire accuracy, in connection with hearsay evidence.

§ 237. **Its history.**—The use of the term *res gestæ* in connection with the law is of comparatively recent origin. It is not found in any of the works on evidence which were published during the first years of this century. So far as the writer can ascertain, the first reference to it in the books will be found in a case decided in the year 1794.¹

§ 238. **Technically accurate definition not possible.**—It is impossible to formulate within the limits of a definition a statement of the rule of evidence relative to *res gestæ* which will be comprehensive enough to include all cases within the rule, and yet at the same time draw the line of demarkation between the competent and the incompetent.² It is said that an ideal definition is one that puts the thing to be defined into a class, and then proceeds to differentiate it from other things in the same class. It may therefore be said that the *res gestæ* are the circumstances, facts and declarations which are connected with and illustrate a litigated fact. The limitations

¹ 25 Howell's State Trials, 440.

So. Rep. 702; *State v. Martin*, 124 Mo.

² *Archer v. Helm*, 70 Miss. 874, 12 514, 28 S. W. Rep. 12.

upon the doctrine will be developed during the course of this chapter.

§ 239. **Definitions of text-writers.**—While, as stated, a perfect definition of the term *res gestæ* can not be formulated, yet a firmer grasp of the subject may be secured by a statement of some of the definitions offered by text-writers and judges. Starkie says,¹ “that all the surrounding facts of a transaction, or, as they are usually termed, the *res gestæ*, may be submitted to a jury, provided that they can be established by competent means, and afford any fair presumption or inference as to the question in dispute.” Greenleaf states the general doctrine thus:² “There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury, along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description.”³ Wharton says:⁴ “The *res gestæ* may be therefore defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may con-

¹ 1 Starkie on Ev., star p. 57.

² 1 Greenl. on Ev., 108.

³ A sharp criticism by Lord Chief Justice Cockburn, on the vagueness

of this definition, will be found in 21 Albany Law Journal 504.

⁴ 1 Wharton on Ev., 259.

sist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or by-stander (*sic*); they may comprise things left undone as well as things done. Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act; necessary in this sense that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. They are the act talking for itself, not what people say when talking about the act. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself.”¹

§ 240. **Definitions of courts.**—In a Georgia case,² the court said: “The circumstances, facts and declarations which grew out of the main fact, and are contemporaneous with and serve to illustrate its character, are part of the *res gestæ*.” The Wisconsin Supreme Court gives the following definition of the term: “The facts surrounding or accompanying a transaction or occurrence which is the subject of legal investigation. They are not themselves the facts which constitute the transaction or occurrence itself, but such as attend it and give character to it.”³

§ 241. **Doctrine stated by a thoughtful writer.**—The following is the conclusion of a thoughtful writer in the American Law Review, in an article on Bedingfield’s Case:⁴ “The leading notion of the doctrine, so far as, upon analysis, it has anything to do with the law of evidence, seems to have been that of withdrawing from the operation of the hearsay rule declarations of fact which were very near in time to that which they tended to prove, fill out or illustrate—being at the same time not narrative, but importing what was the present or but just gone by, and so was open, either immediately, or in the indi-

¹ Quoted with approval in *State v. Martin*, 124 Mo. 514, 28 S. W. Rep. 12.

² *Steinhofel v. Chicago, etc., R. Co.*, 92 Wis. 123, 65 N. W. Rep. 852.

³ *Carter v. Buchannon*, 3 Ga. 512.

⁴ Vol. 14, 817, vol. 15, 1, 71.

cations of it, to the observation of the witness who testifies to the declaration, and who can be cross-examined as to these indications; this nearness of time is made specific by the terms 'contemporaneous' and 'a part of the *res gestæ*,' and it is enough that the declaration be substantially contemporaneous; it need not be literally so. It was either the thing itself which was in issue that was conceived of as the *res gestæ*, or, sometimes, some other thing evidentiary of that; in either case the fact or thing which, relatively to the declaration, is the principal fact—is the *res gestæ*. The notion of '*res gestæ*' as being the concomitant facts of something else, came in with Starkie's text-book and has bred confusion."¹

§ 242. **Must tend to elucidate.**—To admit declarations there must be a main or principal fact or transaction,² and only such declarations are admissible as grow out of the principal transaction and tend to illustrate its character.³ Where an act is done, it is competent to show the acts and declarations connected with it in all cases where its quality is in question.⁴

¹ The stricture of this learned writer upon the view that the *res gestæ* does not include the act itself is hardly warranted. The litigated act lies at the basis of the controversy, and no one would venture to question the admissibility of evidence concerning such act. The questions which call for the discriminating application of the doctrines concerning the *res gestæ* relate to the admissibility of evidence concerning the acts, circumstances and declarations surrounding or accompanying particular acts, the quality of which is in question.

² By this it is not meant to state that the *res gestæ* relates only to the principal question or issue in the case—the authorities afford no warrant for this view—but the thought sought to be expressed is that there must be a fact—whether of a major or a minor character is not important—that re-

quires an explanation; and it is about this that the *res gestæ* of that question crystallizes.

³ *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36; *Plumer v. French*, 22 N. H. 450; *Woods v. Banks*, 14 N. H. 101; *Mahurin v. Bellows*, 14 N. H. 209; *Wright v. City of Boston*, 126 Mass. 161; *Sessions v. Little*, 9 N. H. 271; *State v. Walker*, 77 Me. 488; *Tilson v. Terwilliger*, 56 N. Y. 273; *Equitable M. A. Assn. v. McCluskey*, 1 Colo. App. 473, 29 Pac. Rep. 383; *Wiggin v. Plumer*, 31 N. H. 251; *Frink v. Coe*, 4 G. Gr. (Iowa) 555, 61 Am. Dec. 141; *Piles v. Hughes*, 10 Iowa 579; *Miller v. State*, 8 Gill 141; *Enos v. Tuttle*, 3 Conn. 247; *In re Taylor*, 9 Paige 611; *Hoar v. Abbott*, 146 Mass. 290, 15 N. E. Rep. 659.

⁴ *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22; *Russell v. Frisbie*, 19 Conn. 205; *Sessions v. Little*, 9 N. H.

This is particularly true in cases where the character of the act depends upon the motive or intent with which it was per-

271; *Elkins v. Hamilton*, 20 Vt. 627; *Yarborough v. Moss*, 9 Ala. 382; *Strange v. Donohue*, 4 Ind. 327; *Hubbard v. Harrison*, 38 Ind. 323; *Creighton v. Hoppis*, 99 Ind. 369; *Lund v. Tyngsborough*, 9 Cush. 36; *Ranger v. Goodrich*, 17 Wis. 78; *Mack v. State*, 48 Wis. 271, 4 N. W. Rep. 449; *Wigin v. Plumer*, 11 Fost. 251; *Baker v. Kelly*, 41 Miss. 696, 93 Am. Dec. 274; *Gardner v. O'Connell*, 5 La. Ann. 353; *Downs v. Lyman*, 3 N. H. 486. Within this principle it was held in a breach of promise case that the plaintiff's declarations to her sister, at the time she was preparing her wedding outfit, that the same was to be used for such purpose, were competent. *Wetmore v. Mell*, 1 Ohio St. 26, 59 Am. Dec. 607. See as to declarations and conduct of plaintiff in such cases prior to the estrangement, *Jones v. Layman*, 123 Ind. 569, 24 N. E. Rep. 363, and cases cited. A suit was brought for damages for killing a horse by overdriving. The defendant offered to prove a conversation he had with one C. about the appearance and condition of the horse at a time when the defendant stopped to water it. Held competent, as the conversation "bore upon the questions whether the defendant was rash, heedless and indifferent, or awake, watchful and circumspect." *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. Rep. 862. In *Matteson v. New York, etc., R. Co.*, 62 Barb. 364, it appeared that an accident was caused by the failure to relay ties in time. Held, that the declaration of the defendant's foreman, at the time of doing the work, "that there was sufficient time to relay the ties before the arrival of the train" was admissible. Where letters were destroyed under circumstances which would justify an inference of spoliation, thereby precluding the introduction of secondary evidence, it was held that the declarations of the person who destroyed them, made at the time, were proper evidence. *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547. An interesting case upon this subject is *Travellers' Insurance Co. v. Sheppard*, 85 Ga. 751, 12 S. E. Rep. 18, which was a suit instituted on an accident policy. The facts in evidence were as follows: Deceased and two companions were hunting. The latter were separated from the former. A gun was discharged. The boat in which deceased was sitting was found empty and his gun was found in the bottom of the river. His body was not recovered. A moment after the discharge of the gun, one of the deceased's companions came to the other and in an excited voice said that the deceased had killed himself, or had shot himself. In passing upon the competency of this statement, the court said: "The disappearance, as a whole, was a material evidentiary fact, relevant to the matter in issue. As a whole it was a composite or complex fact, consisting of divers particulars, including the hunt, its abandonment by Boykin and Turner, and the search which immediately ensued. To understand the significance of the disappearance, it is necessary to investigate both the hunt and the search, together with the circumstances attending them. The hunt was a concerted enterprise for joint execution upon a given scene by three actors, each of whom assumed a part and entered upon its performance. It was never finished, but was abandoned, first by Boykin, then by Turner. There can be no doubt that the aban-

formed. In negligence cases the declaration of the person responsible for the injury is frequently clearly indicative of the possession of a mind wholly careless of the rights of others.¹

donment of the hunt and institution of the search constituted a part of the *res gestæ* of the disappearance; for, though the disappearance, as a physical fact, was complete before the search began, as an evidentiary fact to throw all the light that it is capable of throwing on the question of death, it was incomplete until it was verified by the results of the search. Boykin and Turner, as well as Sheppard, were actors in the disappearance, and their acts, as throwing light upon it, are to be investigated and explained. The disappearance did not consist alone of Sheppard's exit from the boat, but included his subsequent absence therefrom and failure to return until a reasonable time had elapsed for his return, had his absence been temporary only. It embraced both affirmative and negative elements and, as a whole, was a continuous act. Its time relation was unchanged until failing to return. He was looked for and could not be found. It is certain that Boykin did not abandon the hunt and enter upon the search by reason of the same causes which influenced Turner. Turner heard the report of the gun, and at the same time some noise, but these alone did not induce him to give up the hunt. He remained in it until he heard some one calling him, and then did not enter upon the search until after he had met Boykin and heard a part of his declarations. Without knowing what Boykin said to him when they met, it would be only a matter of conjecture why Turner abandoned the hunt permanently and engaged in the search; and, without a recital of the subsequent declarations,—those made while he and Boy-

kin were on the way to the river,—it would be a matter of conjecture only as to what induced Boykin to leave the hunt, seek Turner and engage in the search. The search itself being a relevant and material fact, declarations made at the time, calculated to account for and explain it, are also relevant." In this connection attention is called to the provision of the Georgia code defining *res gestæ*, but the case does not appear to rest upon such provision.

¹ A steam-boat collided with a flat-boat. After the collision, and when the steam-boat was about fifty yards away, those on board the flat-boat called for assistance. Immediately afterwards some one on board the steam-boat called out, in a loud and commanding tone, "Go ahead, and let her sink; its nothing but a d—d flat-boat any way." Held competent, as admiralty courts always regard as suspicious the fact that a boat involved in a collision goes on after its officers are apprised of the fact of a collision. *Otis v. Thom*, 23 Ala. 469, 58 Am. Dec. 303. In a case where the plaintiff sued for injuries he received while driving in a wagon, by reason of a grip car running into the wagon, the court held that the plaintiff was entitled to show that at the time of the collision the gripman exclaimed, "G—d d—n you! Get out of the way!" *Lightcap v. Philadelphia Traction Co.*, 60 Fed. Rep. 212. See *Hooker v. Chicago, etc., R. Co.*, 76 Wis. 542, 44 N. W. Rep. 1085. In *Butler v. Manhattan Ry. Co.*, 143 N. Y. 417, 38 N. E. Rep. 454, 42 Am. St. Rep. 738, the defendant was charged with negligence, by reason of the act of one of its

The act must be material to admit the accompanying declarations,¹ and it must be equivocal in its char-

guards in closing the gate to the platform of one of its cars, whereby the plaintiff was injured. The guard, according to the plaintiff's testimony, was looking the other way. The gate struck her, and she uttered a cry of pain. The guard answered her cry by the words: "Go to h—! Shut up." It was held improper to admit the guard's exclamation. The court said: "The act was complete before the remark of the guard was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality." The question of literal contemporaneousness will be treated hereafter. It may be suggested, however, that the ruling of the court, in the above case, seems clearly wrong. The guard's attitude indicated that he was inattentive, and his brutal remark strongly suggested the fact that as he stood there inattentive a moment before it was with a mind indifferent to the safety of those in his charge. The case as reported in 4 Misc. Rep. 401, 24 N. Y. Supp. 142, is the better reasoned.

¹ *Carlton v. Patterson*, 29 N. H. 580. The case of *Fiske v. Cole*, 152 Mass. 335, 25 N. E. Rep. 608, affords an illustration of this proposition. In that case the issue was as to whether certain notes were in existence. Two witnesses testified to seeing them. Held that their declarations at the time of seeing them were incompetent. In *Lander v. People*, 104 Ill. 248, the defendant was charged with rape. Two persons claimed to have witnessed the crime. The next day, as the defendant passed, one of them exclaimed, "There goes the man," and the other answered, "Yes, there

he goes." Held competent, on the ground that the declaration accompanied the act of recognition. This case has, at most, but a scant cover of principle. Somewhat analagous to it is the case of *Chase v. City of Lowell*, 151 Mass. 422, 24 N. E. Rep. 212, but the evidence there admitted is more clearly competent. The following quotation from the case sufficiently explains it: "If the fact that these persons looked at the roots was competent as tending to show the notoriety of the defect, then clearly the accompanying declarations which tended to show the nature of the act of looking were also competent." In the case of *Hoover v. Cary*, 86 Iowa 494, 53 N. W. Rep. 415, the issue was as to whether the defendant had purchased a machine. The machine was set up several days after the alleged purchase. Held, that the declarations of the defendant that he had not purchased the machine, made while it was being set up, were not admissible in his favor, as there was no controversy as to the bringing and setting up of the machine. In a case where a debtor was sued for a bill of whisky it was held that what the debtor said at the time a draft was presented to him by a bank messenger could not be shown in the defendant's behalf. *Maurer v. Miday*, 25 Neb. 575, 41 N. W. Rep. 395. In a homicide case it was held that evidence was properly excluded that a witness had remarked, two days after the killing, as he picked up a pistol at the place of the encounter: "This is Bob's [the deceased] pistol." The court said: "It was a mere comment or observation of a by-stander as to a collateral fact and was clearly hearsay." *Hall v. State*, 86 Ala. 11, 5 So. Rep. 491.

acter.¹ The shadow should never be substituted for the substance. The *res gestæ* is never competent except by way of illustrating the principal fact.²

§ 243. **Declarations must harmonize with act.**—Since the purpose of admitting the *res gestæ* in evidence is to explain a litigated act, it follows that the only acts or declarations which are admissible are those which are germane to such act. The surrounding acts or declarations may to a considerable extent modify the inferences which would be drawn from the naked act—and it is the purpose in admitting them that they should do this—but if they will not so harmonize with the act in question as to make a composite whole, they are inadmissible.³

§ 244. **Must derive credit from act.**—As the doctrine of *res gestæ* constitutes an exception to the general rule excluding hearsay, the integrity of the exception depends upon its foundation in principle, and that principle when applied will be found to be the touchstone which will distinguish between the *res gestæ* and incompetent hearsay. That principle is not found in the instinctiveness of the act or utterance, as a few cases assert,⁴ but in the fact that the proffered evidence, if

For further illustrations, see *Home Ins. Co. v. Marple*, 1 Ind. App. 411, 27 N. E. Rep. 633; *Shauver v. Phillips*, 7 Ind. App. 12, 32 N. E. Rep. 1131.

¹ *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. Rep. 643. Where no question was made upon a trial of a decedent's ownership in his life-time of a note and mortgage sued on, but it was claimed in defense that an agreement existed for the liquidation of the obligation by the debtor's taking care of the decedent during his life-time, it was held that evidence that the decedent had expressed a fear that the defendant would cheat him out of the mortgage was immaterial. *Brown v. Kenyon*, 108 Ind. 283, 9 N. E. Rep. 283.

² *Garrison v. Goodale*, 23 Ore. 307,

31 Pac. Rep. 709. The *res gestæ* must be a *res gestæ* that has something to do with the case and then the declaration must have something to do with the *res gestæ*." *Waldele v. New York, etc., R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41.

³ *Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36; *Tilson v. Terwilliger*, 56 N. Y. 273; *Moore v. Meacham*, 10 N. Y. 207; *Miller v. State*, 8 Gill (Md.) 141; *Equitable M. Asso. v. McCluskey*, 1 Colo. App. 473, 29 Pac. Rep. 383; *Enos v. Tuttle*, 3 Conn. 247; *State v. Daugherty*, 17 Nev. 376; *People v. Dewey*, 2 Idaho 79, 6 Pac. Rep. 103.

⁴ *Insurance Co. v. Mosley*, 8 Wall. 397; *State v. Murphy*, 16 R. I. 528; *Linderberg v. Crescent Mining Co.*, 9 Utah 163, 33 Pac. Rep. 692;

otherwise admissible, has such a connection with the act which is the subject-matter of the inquiry as to derive some degree of credit from it.¹

§ 245. **Must be connected with main event.**—Upon this question a stubborn conflict exists among the cases. The great weight of authority is in favor of the proposition laid down in the head line, and it is in accord with principle, but there are a few divergent authorities of importance, and, though they have been for the most part overruled or modified, they still serve in some degree as false lights which occasionally cause some court to be steered upon the rocks of error. The importance of this subject demands that it should not be passed over with an *ex cathedra* statement of the law, accompanied by a citation of authorities, but that the question

Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838; *Territory v. Davis*, (Ariz.) 10 Pac. Rep. 359; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49 (overruled); *Harriman v. Stowe*, 57 Mo. 93 (modified in *Adams v. Hannibal*, etc., R. Co., 74 Mo. 553, 41 Am. Rep. 333). See *Leahey v. Cass Avenue*, etc., R. Co., 97 Mo. 165, 10 S. W. Rep. 58, 10 Am. St. Rep. 300; *Lewis v. State*, 29 Tex. App. 201, 15 S. W. Rep. 642, 25 Am. St. Rep. 720; *Castillo v. State*, 31 Tex. Cr. R. 145, 19 S. W. Rep. 892; 37 Am. St. Rep. 794; *International*, etc., R. Co. v. *Anderson*, 82 Tex. 516, 17 S. W. Rep. 1039, 27 Am. St. Rep. 902. In the case last cited, the court said, that the rule admitting contemporaneous declarations, and excluding past occurrences, "is a convenient and salutary rule, and probably the most logical one; and if it were an open question in this state, we should hesitate long before adopting another." A good illustration of a declaration excluding the idea of premeditation or design, but which the court was compelled to reject, is af-

forded by the case of *Lambright v. State*, 34 Fla. 564, 16 So. Rep. 582, where the deceased made a statement several hours after the shooting, that a person other than the defendant had shot him. The court frankly said: "In the investigation of this point, we have labored under a bias in favor of allowing the statement of the deceased as to who shot him to go to the jury, but under the facts of this case we have been unable to find any sound rule of law permitting it."

¹*Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36; *Tilson v. Terwilliger*, 56 N. Y. 273; *Bush v. Roberts*, 111 N. Y. 278, 18 N. E. Rep. 732, 7 Am. St. Rep. 741; *Wiggin v. Plumer*, 31 N. H. 251; *Woods v. Banks*, 14 N. H. 101; *Mahurin v. Bellows*, 14 N. H. 209; *Plumer v. French*, 22 N. H. 450; *Ranger v. Goodrich*, 17 Wis. 78; *Mack v. State*, 48 Wis. 271, 4 N. W. Rep. 449; *Equitable M. A. Asso. v. McCluskey*, 1 Colo. App. 473, 29 Pac. Rep. 383; *Ehrlinger v. Douglas*, 81 Wis. 59, 50 N. W. Rep. 1011, 29 Am. St. Rep. 863. A citation to other cases may be found in the text.

should be critically examined, and the expressions of the courts upon the subject shown.

§ 246. **Contemporaneousness—Taylor on evidence.**—Mr. Taylor, in his work on evidence,¹ makes the following statement: "In all these cases the principal points of attention are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction. It was at one time thought necessary that they should be contemporaneous with it; but this doctrine has of late years been rejected, and it seems now to be decided that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential." Although Mr. Taylor has not escaped criticism because of this expression, it must be confessed that its fault is inadequacy rather than inaccuracy. There is a class of cases, as we shall see in subsequent sections, where mental state or intent is involved, in which causal relation, and not time, is the criterion, but particularly in actions involving injuries to the person it will be found that the *res gestæ* is so clearly tied down to the principal act that the element of time may be said to control in a large measure.²

¹ Amer. ed., 1891, 588.

² In the year 1879 the case of *Reg. v. Bedingfield*, 14 Cox's C. L. Cas. 341, was decided by Chief Justice Cockburn. In that case the facts were that the deceased received a fatal wound in the throat. As she met the witness, she exclaimed: "Oh, dear, aunt! See what Bedingfield has done to me." It was held that the admission of this evidence was error. Mr. Taylor criticised the ruling in a pamphlet, and the Chief Justice sought to vindicate his ruling in a pamphlet which he published in reply. The following is an extract from it: "Whatever act or series of acts constitute, or in point of

time immediately accompany and terminate in the principal act charged as an offense against the accused, from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or construc-

§ 247. **Commonwealth v. McPike—Lund v. Tyngsborough.**—

The case of *Commonwealth v. McPike*¹ is a case which has been the subject of much criticism. As the facts were shown in evidence, it appeared that a witness heard a cry of murder upstairs. He started up, but was met by another person (who was also a witness upon the trial), who warned him that he would be killed if he went up. The witness then went for a watchman, and, coming back, went immediately to the room where deceased was, and there found her on the floor bleeding profusely. She stated to him that John [the defendant] had stabbed her. It was held that this was *res gestæ*. It has been suggested that this case might be supported on the ground that it was a statement made with a view to the identification or pursuit of the wrong-doer,² but nothing of this kind is suggested in the reported case, and it must be confessed that upon every possible analysis the declaration of the deceased appears to have been a mere narrative statement. But whatever may be said of this case, its discordant effect is more than neutralized by the later case of *Lund v. Tyngsborough*,³ which, by reason of fullness of discussion, clearness of statement and the frequent reference made to it, is easily the leading case in this country upon *res gestæ* declarations in cases involving injuries to the person.⁴ The importance of this case justifies a state-

tive, *e. g.*, in the case of flight or applications for assistance, form part of the principal transaction, and may be given in evidence, as part of the *res gestæ* or particulars of it; while on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, had ceased, through the completion of the principal act or other determination of it, by its prevention or its abandonment by the wrong-doer, such as, *e. g.*, statements made with a view to the apprehension of the offender, do not form part of the *res gestæ* and should be excluded." As respects the merits of this controversy the writer has to remark that it

seems to him that the truth lay in the middle ground. Mr. Taylor probably has rather latitudinal views concerning the competency of such evidence, while the chief justice seems to leave out of view the fact that after the act is completed it may still speak.

¹*Com. v. McPike*, 3 Cush. 181, 50 Am. Dec. 727.

²*State v. Deuble*, 74 Iowa 509, 38 N. W. Rep. 383.

³*Lund v. Inhabitants of Tyngsborough*, 9 Cush. 36.

⁴Referring to this case, Mr. Justice Clifford, in his dissenting opinion in the case of *Insurance Co. v. Mosley*, 8 Wall. 397, says: "Search is made in vain for any decided case, where the

ment of the conclusions reached by the court in that case even at the risk of possible repetition elsewhere. They are as follows:

"1. That the admission of such evidence is not left to the discretion of the trial judge, as had sometimes been supposed; that its admission is governed by principles of law, which may be applied to particular cases as other principles are applied, in the exercise of a judicial judgment, and that errors of judgment in the case, as in other cases, may be examined and corrected.

"2. That a declaration, if it has its force by itself, as an abstract statement, detached from any particular fact in question, is not admissible in evidence, because it depends for its effect on the credit of the person making it and, therefore, is hearsay.

"3. That mere narrative is never admissible, because such statements are detached from any material act which is pertinent to the issue.

"4. That whenever the act of the party may be given in evidence, his declarations, made at the time, are also admissible, if they were calculated to elucidate and explain the character and quality of the act, and were so connected with it as to derive credit from the act itself, and to constitute one transaction.

"5. That there must be a main or principal fact or transaction, and that such declarations only are admissible as grow out of the principal transaction, serve to illustrate its character, are contemporary with it, and derive some degree of credit from it.

"6. That the main act or transaction is not, in every case, necessarily confined to a particular point of time, but whether it is so or not depends solely upon the nature and character of the act or transaction."

principles and tests which regulate with so much fullness and clearness and control the admission of such evidence as in that case." evidence are so satisfactorily stated, and

§ 248. **Insurance Company v. Mosley.**¹—This was a suit on an accident policy. The widow was permitted to testify that her husband got up in the night and went down stairs; that when he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling, and that he complained of his head, and appeared faint, and vomited. This evidence was held competent. The case holds a prominent place in the discussion upon this subject, though for much the same reason that an unlovely character in a story is called a hero,—using the word in a secondary sense,—because the action of the story revolves about him. So far as the ruling upon the admissibility of the expression of pain was concerned, it was unquestionably correct, but the holding can not be justified that the narrative statement of the deceased, that he had fallen and hurt the back of his head in falling, was competent. The case is but meagerly and unsatisfactorily reasoned, and but two state cases are cited in support of it. One is the case of *Commonwealth v. McPike*,² which, by reason of the review of the Massachusetts cases in Mr. Justice Clifford's dissenting opinion, it appears the court must have known was overruled, and the other is the case of *Hanover Railroad Company v. Coyle*,³ which, as will hereafter be shown, rests on other grounds. A United States Supreme Court decision is cited, but it relates to the *res gestæ* of a business transaction. The other cases referred to are English cases. The limitations upon the writer's space will not permit a review of these cases, but it may be said that they are either so imperfectly reported that it can not be definitely determined whether they are out of line with principle, or else they are not in point for the reason that they involve cases where, since intent is involved, the *res gestæ* has the widest sweep. Although a dissent ought not ordinarily to break the force of a decision, for its presence shows that the court maturely considered the question, yet the clear and incisive opin-

¹ *Insurance Co. v. Mosley*, 8 Wall. 397.

² *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.

³ *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727.

ion of Mr. Justice Clifford, concurred in by Mr. Justice Nelson, clearly convicts the court of error. The fact that the declaration was made but a short time after the accident, and was therefore instinctive, is the predominant theory in the case, and in that view the case does not seem in accord with the case of *Packet Co. v. Clough*,¹ in which the court said that a declaration "is not to be deemed *res gestæ* simply because of the brief period intervening between the accident and the making of the declaration."

§ 249. *People v. Vernon*.²—This is a case which is frequently referred to in connection with *Commonwealth v. McPike*, *supra*.³ The facts were, according to the testimony of a witness, that he heard a shot, and about a half minute later he met the deceased, who immediately said that he had been shot treacherously by the defendant, and proceeded to relate the particular circumstances. It was held, on appeal by the state, that this evidence was admissible. This case declares an extreme doctrine, but it is no longer the law of California.⁴

§ 250. *Expressions from the courts*.—A forceful, and at least for the most part accurate, statement of the law on this subject will be found in the following quotation from the case of *Louisville, etc., R. Co. v. Pearson*:⁵ "The real inquiry is: Did the main act, *proprio vigore*, further assert itself and demonstrate its character or intent by impelling the contemporaneous or subsequent declaration or act offered in evidence, and without which the main act is left incomplete, and only partially proven; or did the declaration or circumstance offered as *res gestæ* originate from some other cause extraneous of the main act? If traceable solely to the main act as the pro-

¹ *Packet Co. v. Clough*, 20 Wall. 528.

² *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49.

³ *Commonwealth v. McPike*, 3 Cush. 181, 50 Am. Dec. 727.

⁴ *People v. Ah Lee*, 60 Cal. 85; *People v. Wong Ark*, 96 Cal. 125, 30 Pac. Rep. 1115; *People v. Lane*, 100 Cal. 379,

34 Pac. Rep. 856. In the *Wong Ark* case, Garoutte, J., in a concurring opinion, states that the case of *People v. Vernon*, 35 Cal. 49, ought to be expressly overruled.

⁵ *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. Rep. 176.

ducing cause, and the declaration or circumstances is illustrative of the main act, it is *res gestæ*, otherwise it is mere hearsay." The New York case most frequently quoted on this subject is *Tilson v. Terwilliger*.¹ Folger, J., in that case, said: "To be a part of the *res gestæ*, they [the declarations] must be made at the time of the act done, which they are supposed to characterize. They must be calculated to unfold the nature and quality of the acts which they are intended to explain. They must so harmonize with these facts as to form one transaction. There must be a transaction of which they are considered a part. They must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of co-existing motives." The following statement is made by the Tennessee Supreme Court:² "The declarations are evidence because they are part of the thing doing; if, therefore, the thing shall have been done and concluded, declarations then made are not evidence."

§ 251. Some vigorous western expressions.—In an Oregon case,³ Thayer, J., in speaking of the case of *Commonwealth v. McPike*,⁴ says: "This mode of disposing of important questions of proof in such cases is becoming quite unsatisfactory. Its tendency has been to overthrow one of the fixed principles of the law, that the best evidence which the nature of the case is susceptible of shall be produced, and it leads to uncertainty and doubt. It is very easy to say that the statements and declarations of a party who has received an injury, made after its occurrence, as to how it was occasioned, are a part of the *res gestæ*, but extremely difficult to explain it, and many times almost wholly impossible to point out any rule under which the determination has been arrived at. An act may sometimes be explained or its nature and quality ascertained, by an accompanying declaration, which may be properly regarded as

¹ *Tilson v. Terwilliger*, 56 N. Y. 273. Ore. 392, 7 Pac. Rep. 508, 53 Am. Rep.

² *Williams v. Bowdon*, 1 Swan 364.

(Tenn.) 282.

⁴ *Commonwealth v. McPike*, 3 Cush.

³ *Sullivan v. Oregon R. & N. Co.*, 12 181, 50 Am. Dec. 727.

a part of the transaction in which it occurred, but it is never the act itself, nor the mere evidence of it. * * * None of the class of cases referred to furnish any certain test as to when such declarations may be given in evidence as a part of the *res gestæ*. It is said in some of them that they must have been made at the time the act transpired; but in others that a considerable time may elapse, and they still be such part; that each case must depend upon its own peculiar circumstances, and be determined by the exercise of a sound judicial discretion. I do not fully understand what is meant by the latter expression. If it is intended by 'a sound judicial discretion,' that the court before whom the trial is had must judge as to whether the transaction was continuing when the declaration was made, or had ended prior thereto, then the question would not differ from other questions regarding the admissibility of testimony; the court would consider the facts and circumstances surrounding the affair and determine therefrom as to its competency; but if, on the other hand, it is to be understood that the court is to decide the question, in accordance with the judge's notions as to justice of the particular case, then it is afloat without any chart to direct it. Precedents, under that view, would be of little value, as the peculiar circumstances attending each transaction would be likely to vary from those surrounding others of a like character which had been adjudged upon sufficiently to authorize a different holding. Such theory necessarily abrogates any law upon the subject; as law is, as a rule, applicable to a class of cases which are alike in principle." Much the same line of thought, although not quite so argumentative in form, is found in the opinion of the Idaho Supreme Court in the case of *People v. Dewey*.¹ The court in that case said: "The learned justice in the case of *Insurance Co. v. Mosley*, *supra*," says: 'The tendency of recent adjudications is to extend, rather than narrow, the scope of the doctrine of *res gestæ*.'" We have failed to discover such tend-

¹ *People v. Dewey*, 2 Idaho 79, 6 Pac. Rep. 103.

² This proposition is denied in *Commonwealth v. Hackett*, 2 Allen 136.

³ *Insurance Co. v. Mosley*, 8 Wall. 397.

ency, after an examination of all the cases within our reach which discuss the principle. If it does exist, it indicates a tendency in the courts to leave the field properly occupied by the judiciary and enter that of the law-making power. This is always a dangerous experiment. If evidence of this character is proper and necessary, it is the duty of the legislature to direct that it be admitted. The rules of evidence have been crystallized from the experience and the best thought of centuries. These rules become clearer, their boundaries better defined, as civilization advances, and as the courts improve in the administration of justice. It is unsafe for the courts to extend or violate them."

§ 252. **Contemporaneousness not always necessary.**—In an English case,¹ Lord Denman said: "The principle of admission is, that the declarations are *pars res gestæ*, and therefore it has been contended that they must be contemporaneous with it, but this has been decided not to be necessary on good grounds, for the nature and strength of the connection with the act are the material things to be looked to, and although concurrence in time can not but always be material evidence to show the connection, yet it is by no means essential."*

¹ *Rouch v. Great Western R. Co.*, 1 Q. B. 51.

*The following expression of the law upon the subject is taken from the case of *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, 117, 47 Am. Rep. 403: "What lapse of time is embraced in the word 'contemporaneous' is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two were substantially contemporaneous, they need not be literally so. The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as virtually to consti-

tute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the ear-marks of a device or after-thought, nor be merely narrative of a transaction which is really and substantially past. To the same effect, *State v. Garrand*, 5 Ore. 216. The Supreme Court of Nebraska, in *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. Rep. 913, said: "The consensus of the authorities seems to be that a declaration, to be a part of the *res gestæ*, need not be coincident in point of time with the main fact proved. It is enough that the two are so nearly connected that the declaration can, in the ordinary

§ 253. The *res gestæ* broader in some cases than in others.

—The statement of Lord Denman, which is set forth in the last section, is the test to which every case must be submitted in which the competency of this class of evidence is involved, and it will be the endeavor in some of the subsequent sections of this chapter to still further develop and illustrate his proposition that it is not time necessarily, but the connection with the act in controversy, that makes evidence of this character admissible. As said by Best, C. J., in an English case,¹ where the question involved was whether a debtor had departed from the realm with intent to defraud or delay his creditors, and thereby committed an act of bankruptcy: "It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible, but if, as in the present case, there are connecting circumstances, it may, even at that time, form part of the whole *res gestæ*.'" The fact is that when we leave questions of injury

course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a proof of the main fact or transaction." See *Collins v. State*, 46 Neb. 37, 64 N.W. Rep. 432.

¹ *Rawson v. Haigh*, 2 Bing. 99.

² See *State v. Daugherty*, 17 Nev. 376. Mr. Wharton, in his work on evidence, § 258, offers two apt historical illustrations of a broad *res gestæ* in certain cases. He says: "When again, there is a social feud, in which two religious factions, as in the case of the Lord George Gordon disturbances, or of the Philadelphia riots of 1844, are arrayed against each other for weeks, and so much absorbed in the collision as to be conscious of little else, then all that such parties do and say under such circumstances is as much part of the *res gestæ* as the blows given in the

homicides for which particular prosecutions may be brought." In the case of *Ward v. White*, 86 Va. 212, 9 S. E. Rep. 1021, 19 Am. St. Rep. 883, which was an assault and battery case, it was held that the defendant was entitled to show, as within the *res gestæ* of the act complained of, a very aggravating newspaper article, published by the plaintiff the day before, concerning the defendant. In *Mayes v. State*, 64 Miss. 329, 1 So. Rep. 733, 60 Am. Rep. 58, the court, in holding a narrative statement incompetent in a murder case, said: "An examination of the approved text-writers, and of the decisions to which they refer, discloses, especially in the decisions of American courts, a somewhat loose regard for well recognized rules governing the admissibility of evidence. That hearsay testimony can not be

to the person and their comparatively narrow environment and enter the broader field where mental state, motive and intent are factors of prominence, it will be found that the authorities are reasonably harmonious.

§ 254. **A test proposed.**—Early in the preliminary investigation of the cases for this work the writer jotted the words upon his note tablet: “Is the event speaking through the person, or is the person speaking of the event?” The similarity of Mr. Wharton’s language¹ and that of some of the cases, all of which were subsequently examined, suggests that this was a case of unconscious assimilation.² Be that as it may, it is believed that the test is a fundamental one, and that to a large extent it reconciles many seemingly discordant cases. The same idea is better expressed in a California case,³ where it is said: “As soon as we pass the line which distinguishes between the transaction talking of itself, and talking as modifying the transaction—in other words, as soon as we pass the line between the

given is universally admitted by the courts which have from time to time been called upon to determine whether statements of this character are competent, and they have without exception declared that when the statement assumes the character of a narrative of a past transaction, it is incompetent. But in many cases what were manifestly completed and finished acts have been, by a sort of construction, treated as incomplete and unfinished, and the statement thus held to be a verbal act incorporated with and a part of the thing done. * * * It is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, nor that it was made under such circumstances as to compel the conviction of its truth. The true inquiry, according to all the authorities, is whether the declara-

tion is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent; in the other, it is not. We are not to be understood as attempting to lay down any rule for the decision of what, under all circumstances, is the limit of the existence of the principal fact which may be explained by contemporaneous declarations. In some cases the *res gestæ* may extend over weeks or months; in others, they are limited to hours or to minutes or to seconds of time.”

¹ Section 239, *supra*.

² In *Bradberry v. State*, 22 Tex. App. 273, 2 S. W. Rep. 592, it is said that the test is, “Were the facts talking through the party, or the party talking about the facts.”

³ *People v. Lane*, 100 Cal. 379, 34 Pac. Rep. 856.

time of the transaction and the time that follows it,—we have no limits that can be imposed.”

§ 255. **Excitement extending the *res gestæ*.**—Where an act of personal violence, voluntary or involuntary, is committed, it is possible to conceive of cases where such act generates in the victim a height of excitement so great as to wholly subordinate his own personality for the time, and to render him the unconscious instrumentality through which the act is still forcing itself, much as the reverberation of the blast is heard in the adjoining mountain. This is fairly illustrated by a Pennsylvania case.¹ In the case referred to, the plaintiff sued for the death of her husband, caused by the explosion of a lamp. The defendant was sought to be held responsible, on the ground that he had negligently sold the husband a dangerous grade of oil, thereby causing the explosion. The court held that what the husband said as to the cause of the accident, when found enveloped in the flames, or within a few minutes afterwards, was clearly competent as part of the *res gestæ*. In an Arkansas case,² it is said that “such declarations need not be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate.”³

§ 256. **Declarations made at place of occurrence.**—This is an important, though not necessarily a controlling, circumstance. In a Wisconsin case⁴ it is said: “*The res gestæ* of this accident did not go with the team to the livery stable, but remained in the *locus in quo* with the injured woman; and the declarations

¹ *Elkins v. McKean*, 79 Pa. St. 493.

² *Carr v. State*, 43 Ark. 99.

³ For other cases within the principle of the above doctrine, see *McMurrin v. Rigby*, 80 Iowa 322, 45 N. W. Rep. 877; *Smith v. Dawley*, 92 Iowa 312, 60 N. W. Rep. 625; *Com. v. Hackett*, 2 Allen 136; *City of Galveston v. Barbour*, 62 Tex. 172, 50 Am. Rep. 519. In a West Virginia case, the deceased gave the alarm when he

was assaulted, and, upon a person responding, who asked what was the matter, the former answered, “Charlie Crookham has stabbed me. For God’s sake, run for the doctor!” Held competent. *Crookham v. State*, 5 W. Va. 510.

⁴ *Prideaux v. City of Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558, and see *Mutch v. Pierce*, 49 Wis. 231, 5 N. W. Rep. 486.

of the driver to the liveryman were a subsequent narrative of the *res gestæ*." It is not a pure sentimentality to attach importance to the fact that the declaration was made by the declarant in the presence of the machinery that did him harm¹—not that the machinery stands as a mute voucher for the truth of the statement, but because the mere passive presence of the machinery has a tendency to maintain that pitch of excitement which subordinates the individual to the event.² It is upon this principle that the case of Hanover, etc., R. Co. v. Coyle³ rests. That case was an action brought by a peddler, who was run over by a locomotive of the defendant, to recover damages for injuries to himself, his wagon and his goods. The court said: "We can not say that the declarations of the engineer was no part of the *res gestæ*. It was made at the time of the accident, in view of the goods strewn along the road, by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we can not say that his declarations made upon the spot at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the transaction." A case somewhat similar to this in its character is that of McLeod v. Ginther's Admr's.⁴ The facts in that case were that a collision of trains occurred, resulting in the death of plaintiff's intestate, one of the engineers. It was held that the remark of the conductor of one train to the engineer of the other, within a few seconds after the casualty, "I had until 10:10 to make Beards," was competent as *res gestæ*. The court deemed the time too short in view of the circumstances, for the declarant to contrive a falsehood, and attached importance to the fact that the statement was made in the presence of the wrecked trains and amidst the search for persons whose fate was then unknown.

¹ See Louisville, etc., R. Co. v. Buck, 116 Ind. 566, 19 N. E. Rep. 453, 9 Am. St. Rep. 883.

² Hanover R. Co. v. Coyle, 55 Pa. St. 396.

³ See Durkee v. Central Pac., etc., R. Co., 69 Cal. 533, 11 Pac. Rep. 130, 58 Am. Rep. 562.

⁴ McLeod v. Ginther's Admr's, 80 Ky. 399.

§ 257. **Same subject—Actor absent.**—As the preceding section has to some extent illustrated, the *res gestæ* rarely leaves the place where the principal event was enacted. Thus, where C. was sued on a note executed to W., and it was claimed that the note had for its consideration the surrender of a note held by W. against C's son, it was held that declarations of C. to his son at the time he delivered to him his note were not competent.¹ In a Michigan case² where the plaintiff's intestate narrated the circumstances of his injury, after he was removed to a house twenty or thirty rods away from the place of the accident, Cooley, J., said: "The affair was all over when Merkle was taken to Mrs. Cook's; he had been removed from the scene of the injury; the surroundings were all changed; the time for exclamation or outcry was past, and nothing for the present remained to be done but to care for the wounded man, leaving investigation into the cause of injury to some more favorable time in the future. The statements made by Merkle to his physician were proper enough as between man and man, but they had no legal value and were therefore improperly admitted." Although the admissibility of declarations as *res gestæ* depends upon no such principle as implied admissions, where statements are made in the presence of a person sought to be bound, yet it is evident, since the *res gestæ* ordinarily ends with the event, that declarations made after one of the principal actors goes from the place where the occurrence took place are not usually to be treated as *res gestæ*.³

¹Cushing v. Willard, 11 Gray 247; Rhutasel v. Stephens, 68 Iowa 627, 27 N. W. Rep. 786; Goff v. Stoughton State Bank, 78 Wis. 106, 47 N. W. Rep. 190.

²Merkle, Admr. v. Township of Bennington, 58 Mich. 156, 24 N. W. Rep. 776, 55 Am. Rep. 666.

³Ohio, etc., R. Co. v. Stein, 133 Ind. 243, 31 N. E. Rep. 180; Com. v. Harwood, 4 Gray 41, 64 Am. Dec. 49; People v. Lane, 100 Cal. 379, 34 Pac. Rep. 856. In a case where a child had

fallen out of an elevator into a basement, the elevator boy continued his ascent; at the third floor he was asked what was the matter, and he replied that he did not know, that he supposed somebody was hurt. It was held that his statement was incompetent, as he had abandoned the child to her fate. T. & H. Pueblo Building Co. v. Klein, 5 Colo. App. 348, 38 Pac. Rep. 608. See Whitaker v. Eighth Ave. R. Co., 51 N. Y. 295.

§ 258. **Period of unconsciousness.**—Where, as the result of the principal act, one of the actors becomes unconscious, his mind, upon a restoration to consciousness, naturally takes up the thread of events at the point where it left off, and this fact in such cases may serve to bridge the *hiatus* of time.¹

§ 259. **Declarations before person extricated from place of injury.**—This is necessarily a potent fact. Where a street car, after running over a person, had stopped, and, while the person was still under it, the motorman said that “the reason he did not stop the car was because he could not reverse it,” the declaration was held *res gestæ*.² So in an Iowa case,³ where the evidence of the plaintiff was that he uttered certain words while his “hand was fast and mashed,” it was held competent to prove his words, the court saying: “It would seem impossible to make declarations more strictly a part of the *res gestæ* than the words of the plaintiff in this case, uttered while his hand was still fast under the upturned coach which had produced the wound.” In a Massachusetts case⁴ a witness was asked “what the servant said to the plaintiff at the time of the accident, and while the plaintiff was being extricated from the carriage, and while the crowd was about?” Justice Bigelow reversed the case because the witness was permitted to answer that the servant said the plaintiff was not to blame. This case can be distinguished from those preceding, for the reason that the event was not speaking, but the servant was merely expressing his opinion upon what, to him, at least, and possibly to the master, was a past occurrence. The suggestion in the question that the crowd was about indicates that some time must have elapsed between the injury and the declaration. In an Alabama case,⁵ the deceased, a brakeman,

¹ *Brownell v. Pacific R. Co.*, 47 Mo. 239; *Collins v. State*, 46 Neb. 37, 64 N. W. Rep. 432; *Irby v. State*, 25 Tex. App. 203, 7 S. W. Rep. 705.

² *Springfield Consolidated Ry. Co. v. Welsch*, 155 Ill. 511, 40 N. E. Rep. 1034. To the same effect, *Casey v. New York, etc., R. Co.*, 78 N. Y. 518.

³ *Frink v. Coe*, 4 G. Greene 555, 61 Am. Dec. 141. See *Durkee v. Cent. Pac. Ry. Co.*, 69 Cal. 533, 11 Pac. Rep. 130, 58 Am. Rep. 562.

⁴ *Lane v. Bryant*, 9 Gray 245, 69 Am. Dec. 282.

⁵ *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. Rep. 176.

was run over by a car. A wheel stopped on his body. About five minutes after, while the wheel was still on his body, a person, whom deceased had called from eighty-five to a hundred yards away, came up, and exclaimed, "What in the world!" The deceased answered: "The hand-hold let me down." Held incompetent. Although this case, in its reasoning is a valuable one, the conclusion reached is of doubtful correctness. It is true that the statement was of a narrative character, so far as its form was concerned, but, with what was perhaps the very car-wheel which caused his death resting upon his body, it can not be said that the declaration of the injured person was not strictly contemporaneous, and no other case involving an injury to the person is now recalled in which such a declaration was excluded.¹

§ 260. **Constructively continuing act.**—A good illustration of a case in which the subsequent declaration is competent, notwithstanding the intervention of time between the wrongful act and the declaration, is afforded by a California case,² in which it was held that statements by the deceased, while he was fleeing, under the apprehension of danger, and calling for assistance and protection, were competent, on the ground that such flight and appeal were the constructively continuing act of the wrong-doer. There are a number of cases in this country in which it has been held that declarations made within a brief interval after a crime, which have for their end the apprehension of the wrong-doer, are competent.³ Within close

¹ In Ohio, etc., *R. Co. v. Stein*, 133 Ind. 243, 31 N. E. Rep. 180, Elliott, J., says: "We are strongly inclined to the opinion that, where an employe is injured in a collision, all that is done towards stopping the train and relieving the injured employe from a dangerous position forms part of one occurrence." The earlier case of Louisville, etc., *R. Co. v. Buck*, 116 Ind. 566, 19 N. E. Rep. 453, 9 Am. St. Rep. 883, is an extreme case in this direction, because of the circumstantial

character of the statement which was held competent. Compare *Parker v. State*, 136 Ind. 284, 35 N. E. Rep. 1105, and *Martin v. New York, etc., R. Co.*, 103 N. Y. 626, 9 N. E. Rep. 505.

² *People v. Ah Lee*, 60 Cal. 85.

³ *State v. Driscoll*, 72 Iowa 583, 34 N. W. Rep. 428; *Jordan v. Commonwealth*, 25 Grat. 943; *Lambert v. People*, 29 Mich. 71; *People v. Simpson*, 48 Mich. 474, 12 N. W. Rep. 662; *State v. Moore*, 117 Mo. 395, 22 S. W. Rep. 1086; *State v. Martin*, 124 Mo. 514, 28

limits these declarations may be admitted without a violation of principle, but it must be confessed that for the most part the decided cases on this subject exhibit a dangerous tendency.

§ 261. **Death protracting the *res gestæ*.**—This element may possibly be a factor in determining upon the admissibility of declarations. The receiving of an injury of so grave a character as to cause death is often accompanied with a shock which to a certain extent sinks the individuality; the shattered nerves and the pain, although present conditions, have a strong tendency to cause the mind, by a reflex act, to live over again the horrors of that moment so big with fate to the individual, and thus, although the act of violence has actually ceased, it constructively continues. Nevertheless, since the law is a practical science, trial judges should not admit subsequent declarations in such cases unless the surrounding circumstances reasonably manifest the fact that the event still speaks. There is no warrant for admitting such declarations on a theory analogous to that which permits dying declarations to go in evidence. Upon this proposition the case of *Waldele v. New York Cent., etc., R. Co.*¹ is the leading case. It was there said: "This evidence can not be received upon the theory that there is a very strong probability that the declarations made by the intestate were true. The probability would have been equally strong if they had been made several hours later, when he was removed to the hospital. The probability is that as he neared his death, he would have told the truth, if he had said anything about it. The same may be said of many statements not under oath. They are frequently made under such circumstances as entitle them to very great, and frequently to implicit, confidence; and yet they do not answer the requirements of the law. * * * Even dying declarations are not received in civil actions, unless part of the *res gestæ*. * * * There is no middle ground for receiving declarations of this

S. W. Rep. 12. Where a complaint that it was not *res gestæ*. *Shoecraft v. Waldele* was made by the prosecuting witness, State, 137 Ind. 433, 36 N. E. Rep. 1113. several blocks away from the robbery, ¹ *Waldele v. New York Central, etc., R. Co.*, 95 N. Y. 274, 47 Am. Rep. 41. that he had been robbed, it was held

character—that is, they must be received either as dying declarations or as declarations forming part of the *res gestæ*.”

§ 262. **Statements against interest.**—While, as we have seen, instinctiveness is not the test in determining what declarations are *res gestæ*, yet since, as Wharton points out, the causal relation between the act and the declaration is broken by individual wariness, seeking to manufacture evidence for itself, it results that in doubtful cases the fact that a declaration is against interest may serve to turn the scale in favor of the admission of the declaration.

§ 263. **Narrative excluded.**—This proposition is an obvious one, but it is stated in order that further cases may find a place in the notes.¹

§ 264. **Exclamations of pain, etc.**—When it becomes important to illustrate the physical condition of a person, either at the time of an injury, or at any subsequent time, it is competent to illustrate such condition, with reference to its severity, effect and nature, by showing the complaints or exclamations of present existing pain or malady.² Pain and

¹ *People v. Davis*, 56 N. Y. 95; 513; *Merchants' Bank v. Berthold*, Osborn v. Robbins, 37 Barb. 481; 45 Mo. 527; *People v. O'Brien*, 92 Cronnse v. Fitch, 14 Abb. Pr. 346; Mich. 17, 52 N. W. Rep. 84; *Tennis v. Interstate C. R. T. R. Co.*, 45 Kan. 503, 25 Pac. Rep. 876; *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112; *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181, 9 So. Rep. 577; *Innis v. Steamer Senator*, 1 Cal. 459; 54 Am. Dec. 305; *Durkee v. Central Pac. R. Co.*, 69 Cal. 533, 11 Pac. Rep. 130, 58 Am. Rep. 562; *T. & H. Pueblo B. Co. v. Klein*, 5 Colo. App. 348, 38 Pac. Rep. 608; *Territory v. Clayton*, 8 Mont. 1, 19 Pac. Rep. 293. Many of these cases strongly enforce the limitations of the text concerning the admissibility of declarations as *res gestæ*.

² *Com. v. Leach*, 156 Mass. 99, 30 N. E. Rep. 163; *Kennard v. Burton*, 25

suffering are, to a large extent at least, subjective, and the expressions under consideration are their "natural evidence."¹ Redfield, C. J., in a Vermont case,² said: "The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode, except by such declarations as to their effect, but they are not admitted as part of the *res gestæ*." That this is not an authoritative statement of the law will be appreciated when it is stated that the question in the case related to the admissibility of the subsequent complaints of a prosecuting witness that he had been robbed. The learned chief justice probably had in mind the proposition that mere *statements* of pain or suffering or of physical condition, are not *res gestæ*, but are admitted

Me. 39, 43 Am. Dec. 249; Earl v. Tupper, 45 Vt. 275; Howe v. Plainfield, 41 N. H. 135; Towle v. Blake, 48 N. H. 92; Werely v. Persons, 28 N. Y. 344, 84 Am. Dec. 346; Brown v. N. Y. Cent. Co., 32 N. Y. 597, 88 Am. Dec. 353; Matteson v. N. Y. Central R. Co., 35 N. Y. 487, 91 Am. Dec. 67; Roche v. Brooklyn City, etc., R. Co., 105 N. Y. 294, 11 N. E. Rep. 630, 59 Am. Rep. 506; Hyatt v. Adams, 16 Mich. 180; Cleveland, etc., R. Co. v. Newell, 104 Ind. 264, 3 N. E. Rep. 836; 54 Am. Rep. 312; Bennett v. Northern Pac. R. Co., 2 N. D. 112, 49 N. W. Rep. 408; Yost v. Ditch, 5 Blackf. 184; Puett v. Beard, 86 Ind. 104; Board of Comrs. of Wabash Co. v. Pearson, 120 Ind. 426, 22 N. E. Rep. 134, 16 Am. St. Rep. 325; Holly v. Bennett, 46 Minn. 386, 49 N. W. Rep. 189; Caldwell v. Murphy, 11 N. Y. 416; Marr v. Hill, 10 Mo. 320; Wadlow v. Perryman, 27 Mo. 279; Texas, etc., R. Co. v. Barron, 78 Tex. 421, 14 S. W. Rep. 698. The declarations of a slave as to her ailments were held admissible in an action on a warranty accompanying her sale. Allen v.

Vancleve, 15 B. Mon. (Ky.) 236, 61 Am. Dec. 184. Where an injured child said, "Pa, don't hold my neck, it is pretty near broke," it was held competent to prove the speaking of the words, as a complaint of an existing physical condition. Sturgeon v. Sturgeon, 4 Ind. App. 232, 30 N. E. Rep. 805. The declaration, "Go for the doctor quick! I have taken another cup of that coffee and it is about to kill me," was held admissible. Johnson v. State, 30 Tex. App. 419, 17 S. W. Rep. 1070, 28 Am. St. Rep. 930. See Field v. State, 57 Miss. 474, 34 Am. Rep. 476. The plaintiff's *statement* as to his condition may be received in evidence (at least under certain circumstances, as mentioned hereafter) if free from suspicion that it was spoken with reference to future litigation. Illinois Cent. R. v. Sutton, 42 Ill. 438, 92 Am. Dec. 81; Birmingham Union R. Co. v. Hale, 90 Ala. 8, 8 So. Rep. 142, 24 Am. St. Rep. 748.

¹ Holly v. Bennett, 46 Minn. 386, 49 N. W. Rep. 189.

² State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312.

from necessity.¹ We do not understand that the admissibility of exclamations, and other like emanations of pain and suffering, rests on the latter ground. In actions for injuries to the person there is often grave danger that these declarations may be simulated, instead of being the outward expressions of real suffering, but this is a question for the jury.² In so far as this is *res gestæ* evidence, it only goes to its weight that it was made in the presence of a person who was not a physician.³ The competency of that class of declarations which are admitted on the ground of necessity, that is, *statements* of bodily ailments, will be considered hereafter.

§ 265. **Declarations of past pain.**—As the doctrines of *res gestæ* practically rule this class of declarations, it follows that, with the exception of declarations to physicians, all declarations of past suffering or pain, or past conditions, are to be rigidly excluded.⁴ Statements as to how the injury was received, whether made to a professional man or otherwise, are self-serving in their character and can never be shown in evidence in support of the claim of the party making them.⁵ Such declarations at the best are hearsay.

¹ See *Goodwin v. Harrison*, 1 Root 80; *v. Leggett*, 115 Ind. 544, 18 N. E. Rep. 53; *Reed v. New York, etc., R. Co.*, 45 N. Y. 574; *Sanders v. Reister*, 1 Dak. 151, 46 N. W. Rep. 680; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312; *Rogers v. Crain*, 30 Tex. 284; *Field v. State*, 57 Miss. 474, 34 Am. Rep. 476. In *Kelley v. Detroit, etc., R. Co.*, 80 Mich. 237, 45 N. W. Rep. 90, 20 Am. St. Rep. 514, it was held improper to permit evidence, on behalf of the plaintiff, of her declarations each morning that she had not slept well the night before.

² *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312; *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. Rep. 628.

³ 1 Phil. on Ev. (1849 ed.) 190; *North Pac. R. Co. v. Umlin*, 158 U. S. 271, 15 Sup. Ct. Rep. 840; *Thomas v. Herrall*, 18 Ore. 546, 23 Pac. Rep. 497; *Rogers v. Crain*, 30 Tex. 284; *Sturgeon v. Sturgeon*, 4 Ind. App. 232, 30 N. E. Rep. 805, and see cases cited in first note to this section.

⁴ 1 Phil. on Ev. (1849 ed.) 191; *Board of Comrs. of Hancock County v. Leggett*, 115 Ind. 544, 18 N. E. Rep. 53; *Ft. Worth, etc., R. Co. v. Stone* (Tex. Civ. App.), 25 S. W. Rep. 808.

§ 266. **Declarations of past pain to doctor.**—The authorities are by no means in accord on this question. In reason it would seem that such declarations, if made with a view of treatment, should be held competent, in cases where the physician is put upon the stand as an expert. The plaintiff should be entitled to something besides a conclusion based on a hypothetical case, from the one who has treated him, and who has, from an observation of the patient and a history of the case, reached a definitive conclusion as to plaintiff's ailment; while the fact that the declaration was made with a view to treatment, and to a person well qualified to judge whether a statement of a past symptom was true, reduces the liability of the physician's being imposed upon to the minimum.¹ There are cases² in which it is held that declarations as to past conditions, symptoms, sensations and feelings are competent, where they are expressed during the course of an examination made by a physician to enable him to give his opinion as an expert witness. But this is obviously carrying a rule, which had its origin in necessity, too far, at least in states where parties in interest are competent witnesses,³ for the statement would not

¹ In *Barber v. Merriman*, 11 Allen 322, Bigelow, C. J., said: "The opinion of a physician or surgeon is necessarily formed in part on the statements of his patient, describing his conditions and symptoms, and the causes which have led to the injury or disease under which he appears to be suffering. This opinion is clearly competent, as coming from an expert. But it is obvious that it would be unreasonable, if not absurd, to receive the opinion in evidence, and at the same time to shut out the reasons and grounds on which it was founded." As supporting the proposition of the text as to the admissibility of such testimony, see *Hewitt v. Eisenbart*, 36 Neb. 794, 55 N. W. Rep. 252, and *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312, and cases there cited; *Stewart*

v. Everts, 76 Wis. 35, 44 N. W. Rep. 1092, 20 Am. St. Rep. 17; *Chapin v. Marlborough*, 9 Gray 244, 69 Am. Dec. 281; *Lush v. McDaniel*, 13 Ired. L. 485, 57 Am. Dec. 566. In a case where a physician testified that there were no external evidences of injury upon the person of the patient, it was held that he might express an opinion as to the existence of the injury charged, based on indications of suffering and on what the patient said as to her condition. *Quaife v. Chicago, etc., R. Co.*, 48 Wis. 513, 33 Am. Rep. 821.

² *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312, and cases cited.

³ *Darrigan v. New York, etc., R. Co.*, 52 Conn. 285, 52 Am. Rep. 590; *Rowland v. Philadelphia, etc., R. Co.*, 63 Conn. 415, 28 Atl. Rep. 102.

§ 269. **Statements of physician.**—Cases can be imagined where the statement of the physician to the patient might be competent.¹ Since both the physician and the patient may be actors, the involuntary exclamation of either may throw light upon the patient's then condition. But inasmuch as it would be the patient's condition at the time of the examination which would be the primary question with the examining physician, rather than the manner in which that condition was brought about, it has been held improper to permit a witness to testify that when a physician examined the plaintiff, he said: "This is from a blow."²

§ 270. **Statements of physical condition—Statute permitting parties to testify.**—It is to be borne in mind, as the head line of the section indicates, that we are now treating of *declarations* of physical condition as contradistinguished from *exclamations* of pain or suffering. As heretofore stated, the latter class of evidence is strictly *res gestæ*; the present subjective condition is the fact in question and the accompanying exclamation of pain is a natural concomitant which illustrates it. As the *res gestæ* is always primary evidence, the question we are about to raise can not apply to this class of evidence. The question now to be considered is: What is the effect of statutes which enable parties to testify, as applied to *statements*

Louisville, etc., R. Co. v. Falvey, 104 Ind. 409, 3 N. E. Rep. 389; Quaife v. Chicago, etc., R. Co., 48 Wis. 413, 33 Am. Rep. 821.

¹Such a case occurred in the writer's professional experience. A suit was brought against a surgeon, charging him with negligence in omitting to make a sufficient ligation upon the pedicel of an abdominal tumor, and in negligently leaving the case without medical attendance. At two o'clock of the morning after the operation a physician was called in, and it became material upon the trial to know whether at that time the hemorrhage, which had set in, could have

been stopped. It was held, and properly it would seem, that it was competent to prove that the physician said, as he had his finger upon the pulse of the patient, "My dear woman, you are dying."

²Mellwitz v. Manhattan R. Co., 62 Hun 622, 17 N. Y. Supp. 112; Village of Ponca v. Crawford, 23 Neb. 662, 37 N. W. Rep. 609, 8 Am. St. Rep. 144. In McFadden v. Santa Ana, etc., R. Co., 87 Cal. 464, 25 Pac. Rep. 681, a personal injury case, it was held competent to prove a physician's advice as to the treatment of a patient.

of physical condition made by such parties out of court to persons other than physicians called on for treatment? This is a serious question. It has been argued that the statute adds to the litigant's rights and subtracts none of them, but if it be true that the admissibility of declarations of physical condition rests on necessity, does it not follow that the abrogation of the necessity for the rule takes away the right to the evidence? The maxim reads: "Since reason is the soul of law, when the reason for the law ceases, the law ceases." The proposition presented, as already intimated, does not, it is conceived, militate against the competency of the evidence of attending physicians as to statements made to them, because of the importance to the plaintiff of having laid before the jury the physician's opinion of plaintiff's ailment, which the physician, of course, bases on his personal observation and the history of the case. But as to mere statements of physical condition not made for the purpose of treatment, it would seem that the statute, by substituting a higher class of evidence—namely, evidence under oath, instead of an irresponsible declaration—had, *ipso facto*, rendered this class of declarations incompetent. More than one hundred and fifty years ago, Lord Hardwick said:¹ "The judges and sages of the law have laid it down that there is but one general rule of evidence, 'the best the nature of the case will admit.'"

§ 271. Same subject.—The cases considered.—In a New York case,² Peckham, J., said: "Evidence of exclamations, groans and screams is now permitted more upon the general ground that it is a better and clearer and more vigorous description of the then existing physical condition of the party by an eye-witness than could be given in any other way. It characterizes and explains such condition. * * * But evidence of simple declarations of a party, made some time after the injury, and not to a physician for the purpose of being at-

¹Omychund v. Barker, 1 Atk. 21. ²Roche v. Brooklyn, etc., R. Co., Campbell's Lives of the Chancellors. 105 N. Y. 294, 11 N. E. Rep. 630, 59 Hardwick Ch. 131, Vol. 6, p. 201, 5 Am. Rep. 506.
Eng. ed.

tended to professionally, and simply making the statement that he or she is then suffering pain, is evidence of a totally different nature, is easily stated, liable to gross exaggeration, and of a most dangerous tendency, while the former necessity for its admission has wholly ceased. As is said by Judge Allen, in *Reed v. Railroad*, *supra*,¹ "the necessity for giving such declarations in evidence, when the party is living and can be sworn, no longer existing, and that being the reason for its admission, the reason of the rule ceasing, the rule itself, adopted with reluctance and followed cautiously, should also cease. With the rule as herein announced there can be no fear of a dearth of evidence as to the extent of the injury, and the suffering caused thereby. The party can himself be a witness, if living, and, if dead, the suffering is of no moment, as it can not be compensated for in an action by the personal representative under the statute, and the exclamations of pain, the groans, the sighs, the screams, can still be admitted."² In a Massachusetts case,³ the supreme court of that state said: "Since parties have been permitted to testify, there is, perhaps, an additional reason why great strictness should be used in admitting as evidence the declarations of a party in his own favor when made in the absence of the other party." It seems plain in the light of these authorities that the old doctrine must be abandoned to the extent indicated in this and the preceding section. As the New York case intimates, the old rule, adopted from necessity, was subject to gross abuses. In these days when "Railroad Spine" is made the subject of treatment in technical articles in the medical journals, the court should guard against affording too abundant

¹ *Reed v. New York, etc., R. Co.*, 45 N. Y. 574. Rep. 1092, 20 Am. St. Rep. 17. The cases of *Board of Comrs. of Hancock County v. Leggett*, 115 Ind. 544, 18 N. E. Rep. 53, and *Sanders v. Reister*, 1 Dak. 151, 46 N. W. Rep. 680, are not in conflict with the case quoted from, as they are cases involving mere complaints of pain.

² The doctrine of this case was followed in *Kennedy v. Rochester City, etc.*, R. Co., 130 N. Y. 654, 29 N. E. Rep. 141. To the same effect, *Com. v. Leach*, 156 Mass. 99, 30 N. E. Rep. 163. As bearing out the text, in intimation at least, see *Brown v. Weightman*, 62 Mich. 557, 29 N. W. Rep. 98; *Stewart v. Everts*, 76 Wis. 35, 44 N. W.

³ *Pickering v. City of Cambridge*, 144 Mass. 244, 10 N. E. Rep. 827.

opportunity to manufacture evidence in support of fraudulent claims. The necessity for receiving this class of evidence no longer exists, and the enactment of a statute which gives to an injured party the right to describe his ailments in detail calls upon the court to emancipate itself from the operation of a non-necessary and objectionable rule. As said by Justice Story:¹ "It is obvious that as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest abuse."

§ 272. Prior statements by person whose life is insured.—

If a life insurance policy is made payable to a third party—as to the wife or child or a creditor of the deceased—the statements made by him, prior to the taking out of the policy, are inadmissible as against the holder of the insurance,² unless the statements are such complaints or exclamations as are the usual concomitants or emanations of ill-health, and are, practically speaking, a *res gestæ* expression of it,³ or are introduced for the sole purpose of proving that at the time of the taking out of the insurance its subject knew that he was making a false representation.⁴ Declarations concerning past conditions are never *res gestæ*, and so the prior statements of the deceased as to his former state of health, as to a former severe illness,

¹ *Nicholls v. Webb*, 8 Wheat. 326.

² *Hermans v. Fidelity Mut. Life Asso.*, 151 Pa. St. 17, 24 Atl. Rep. 1064; *Rawls v. Am. Mut. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280; *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186, 20 Am. Rep. 522; *Mobile Life Ins. Co. v. Morris*, 3 Lea (Tenn.) 101, 31 Am. Rep. 631; *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185; *Union Cent. L. Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573; *Fraternal Mut. Ins. Co. v. Applegate*, 7 Ohio St. 292; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Southern Life Ins. Co.*

v. Booker, 9 Heisk. 606, 24 Am. Rep. 344; *Supreme Lodge Knights of Pythias v. Schmidt*, 98 Ind. 374; *Pennsylvania, etc., Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

³ See authorities in preceding section.

⁴ *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186, 20 Am. Rep. 522; *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185; *Penn. Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

or as to the fact of his having had brothers or sisters, have been held incompetent.¹ Statements on his part as to his habits are not within the rule admitting declarations as to health.² To render a statement made by the deceased admissible, it should appear *de hors* the declaration, either directly or by legitimate inference: 1, that at the time the declaration was made, the declarant was suffering from some bodily ailment or infirmity;³ 2, that the same continued down to the time of the taking out of insurance, so as to make the inquiry relevant;⁴ and, 3, that the complaint, exclamation or expression related to his health at the time the declaration was made. In a Maine case,⁵ where the person upon whose life the policy was written had been for some time suffering with pulmonary disease, and had made statements in her letters to a friend, some three months preceding the execution of the policy, concerning her then state of health, the court said: "Anything in the way of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady."

§ 273. Subsequent statements by person whose life is insured.—As a general rule, the subsequent declarations of a person upon whose life an insurance is effected for the benefit of another are inadmissible against the latter, for the reason that after the contract has been entered into the subject of the insurance has no such relation to the holder of the policy as

¹ *Schwarzbach v. Ohio Valley Pro. Union*, 25 W. Va. 622, 52 Am. Rep. 227. Where the issue was as to whether a person was diseased at the time he enlisted in the army, it was held that his declarations shortly before as to what a physician had told him as to his health was incompetent. *Ashland v. Marlborough*, 99 Mass. 47.

² *Rawls v. Am. Mut. Life Ins. Co.*, 36 Barb. 357.

³ See *White v. Rayburn*, 11 Ore. 450, 5 Pac. Rep. 345.

⁴ It is probably with a view to this principle that the case of *Swift v. Mass. Mut. Life Ins. Co.*, 63 N.Y. 186, 20 Am. Rep. 522, suggests that declarations long anterior to the taking out of the policy should be excluded. The second element mentioned in the text would be non-necessary where there was an express warranty against the past existence of the ailment or infirmity.

⁵ *Asbury Life Ins. Co. v. Warren*, 66 Me. 523, 22 Am. Rep. 590.

gives him power to destroy or affect it by unsworn statements.¹ No reason exists, however, why a subsequent exclamation indicative of pain or suffering should not be admitted, as showing the then condition of the person, if that is material to the inquiry. In an English case² it was held, where an insurance had been taken out by the plaintiff upon the life of his wife, that her declarations as to her health made a few days after the insurance was effected, and while she was confined to her bed, were admissible.

§ 274. **Declarations preceding act.**—Upon principle there is no reason why a declaration may not be competent which precedes a litigated act, if the two are connected.³

¹ *Mulliner v. Guardian Mut. Life Ins. Co.*, 1 T. & C. 448; *Rawls v. Mut. Life Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280; *The Fraternal Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 292; *Washington Life Ins. Co. v. Haney*, 10 Kan. 525; *Supreme Lodge Knights of Pythias v. Schmidt*, 98 Ind. 374.

² *Aveson v. Kinnaird*, 6 East 188.

³ In *Ehrlinger v. Douglas*, 81 Wis. 59, 50 N. W. Rep. 1011, 29 Am. St. Rep. 863, the action was to recover the value of a dog shot by the defendant. It became material to determine whether the dog had snapped at defendant's wife. The defendant sought to show that his wife had called him from his work, saying that the dog had snapped at her, whereupon he shot the dog. It was held that he was not entitled to introduce in evidence his wife's declarations, the court saying: "We are aware of no rule which stamps the character of *res gestæ* upon a statement made by a third person to the defendant of an antecedent fact or circumstance, so that proof that the statement was made becomes competent evidence to prove the truth of the statement."

* * * "Most assuredly the decla-

ration of defendant's wife did not grow out of such fact or transaction; neither does it derive any degree of credit therefrom, because the act of shooting had not been committed or contemplated when the declaration was made." The court does not seem to have considered the admissibility of the declaration to rebut any inference of malice, and thereby prevent the assessment of punitive damages. The early case of *Ross v. Bank of Burlington*, 1 Aikens (Vt.) 43, 15 Am. Dec. 664, was an action to recover \$800, which the plaintiff contended he ought to recover from the defendant bank, on the ground that he was the holder and owner of that amount in bills of said bank, which were burned and destroyed with and on board the steam-boat Lake Champlain, September 5, 1819. The plaintiff testified to the obtaining of the bills from the bank, the entrusting of them in a package to the captain of the boat, and that at the time of such delivery to the captain he spoke of the package as containing \$800. This declaration was held competent, the court attaching importance to the fact that the plaintiff could not have appre-

§ 275. **Declarations showing state of mind.**—Where the mental condition of a person at a particular time is in issue, his appearance, conduct, acts and declarations, after as well as before the time in question, have been held admissible in evidence, if sufficiently near in point of time, and if they appear to have any tendency to show what that mental condition was.¹ It will be noticed that this statement of the law allows more latitude respecting the time of making declarations calculated to evince the state of mind of the declarant, than in cases where overt acts are sought to be illustrated by declarations. Many of the cases involve the mental *status* of testators, but the principle is the same wherever applied.² In a Vermont case³ it was held that the plaintiff in a slander case might testify that he was overcome and cried, that he could not sleep nights and could not work, and did not feel like seeing any one. The court said: "The natural tendency of the alleged slander was to produce 'pain and anguish of mind,' the effect averred in the declaration. Being a proper allegation, it was proper to prove by the plaintiff that the slander *in fact* had the effect alleged, and the extent of it."⁴ *State v. Cook*⁵ is a case where the defendant in a prosecution for rape proved that subsequently, and on the day of the alleged rape, the prosecutrix said that she had had sexual intercourse with the defendant,

hended the burning of the boat at the time of the declaration. In strictness the case cited was a declaration contemporaneous with the litigated act, namely, the delivery of the money to the captain, but the case serves as an illustration of how a declaration may be especially forceful because made before the consequences which gave rise to the action could have been apprehended.

¹ *Lane v. Moore*, 151 Mass. 87, 23 N. E. Rep. 828, 21 Am. St. Rep. 430; *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. Rep. 961, and cases cited.

² *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. Rep. 961, and cases cited.

³ *Rea v. Harrington*, 58 Vt. 181, 2 Atl. Rep. 475, 56 Am. Rep. 561.

⁴ In *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. Rep. 628, which was a libel case, it was held competent to show in evidence the conduct, exclamations and acts of the plaintiff when she read the article, and also the further fact that others heard her cry and sob in the night. To the same effect, see *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. Rep. 857, 16 Am. St. Rep. 920. The case of *Stowe v. Heywood*, 7 Allen 118, is a case to the contrary.

⁵ *State v. Cook*, 65 Iowa 560, 22 N. W. Rep. 675.

and would have it again, and that she did not care what other people might say. This was held competent as tending to show that her feelings were of a very amatory character. *Jones v. State*¹ serves to illustrate the doctrine under consideration. In that case the defendant was charged with murder. The claim of the defense was that the shooting was accidental. It was held proper to prove that while traveling on a train, some hours before, the gun, with which the shooting was done, had fallen over, and that the defendant then remarked that it was not loaded.

§ 276. **Declarations showing state of mind—Subject continued.**—In a United States case,² the plaintiff sued for personal injuries caused by the derailment of defendant's train. It appeared that a tie upon the track had caused the derailment, and it was held that the company was entitled to prove that it had had trouble with some of its employes less than two days before; that four persons were seen on the track in that neighborhood the night of the wreck; that they seemed to try to avoid the track-walker; that thirty-six hours before, and during the trouble with its employes, one of them said that the company would "catch h—l" and that another said that unless he was paid at once "he would ditch the train." Unless the declaration is so closely associated with the act which is in question that the declaration may be accepted as an index of the frame of mind of the declarant at the time the act was committed, it should be rejected as of no evidentiary force. Confessions of crime and other hearsay statements of persons, whether living or deceased, should not be allowed to go in evidence, but this subject has already been discussed.³

§ 277. **Declarations by deceased persons as to intent.**—It is due, no doubt, to the absence of other testimony that so many cases relating to declarations of intent are cases in which the declarants were dead. It is not to be understood, however, that it is the element of death which permits these declarations to be

¹ *Jones v. State*, 103 Ala. 1, 15 So. Rep. 891.

² *Worth v. Chicago, etc., R. Co.*, 51 Fed. Rep. 171.

³ *Ante*, § 227, *et seq.*

introduced, for hearsay evidence is not admissible merely because in the particular case none better can be had.¹ The adjudications in the class of cases mentioned now claim our attention. Where it became material to show that the deceased was not a wrong-doer when injured, it was held competent to prove his declaration, made a few minutes before, that he intended to go to Washington.² In a Tennessee case,³ it was adjudged proper to show a declaration of the deceased, made the evening before he was missed, to the effect that he was going to Pine Mountain, in search of a saltpeter cave, as explaining his presence there.⁴ *Com. v. Trefethan*,⁵ is an able and instructive opinion, vindicating the right of a defendant, who was charged with the murder of a pregnant, unmarried woman, found dead, under circumstances indicating that she had been drowned, to introduce in evidence a letter written by the deceased to her mother, the day before her death, stating her condition, and her purpose to drown herself. Like decisions

¹ *State v. Dart*, 29 Conn. 153, 76 Am. Dec. 596; *Siebert v. People*, 143 Ill. 571, 32 N. E. Rep. 431; *Ante*, § 225.

² *Baltimore, etc., R. Co. v. State*, to use of Chambers, 81 Md. 371, 32 Atl. Rep. 201. To the same effect, *Lake Shore, etc., R. Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. Rep. 1052. So in *Douglas v. Chapin*, 26 Conn. 76, which was an action on a contract by which plaintiff's decedent contracted to act as captain of defendant's steamboat, that was then at Sacramento, the court held that evidence was proper of the declaration of decedent, on leaving San Francisco, of his purpose to go to the boat. To same effect, *Reg. v. Buckley*, 13 Cox C. C. 293.

³ *Kirby v. State*, 7 Yerg. 258.

⁴ *Contra*, *Reg. v. Wainwright*, 13 Cox C. C. 171. In *State v. Jones*, 64 Iowa 349, 20 N. W. R. 470, 17 N. W. Rep. 911, which was a prosecution for murder, the court sanctioned the admission of evidence that on the night

before he was killed, the deceased declared his purpose to go the next morning to buy steers at the place where he afterwards met his death, as that evidence tended to show that he went there on legitimate business. To the same effect, *Farrar v. State*, 29 Tex. App. 250, 15 S. W. Rep. 719. In *State v. Howard*, 32 Vt. 380, the defendant was charged with producing a miscarriage on one Olive Ashe, which resulted in her death. Her twin sister was permitted to testify that it was understood between her and the deceased, when they left Sutton, that the latter should have an abortion produced. *State v. Dickinson*, 41 Wis. 299, in which the declarations were held competent, was in its facts substantially similar to the last case, except that the declarations preceded the act of going three days.

⁵ *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. Rep. 961.

upon quite similar facts are found elsewhere.¹ In an Illinois case,² the opposite conclusion was reached, but that case can be distinguished from the others on the ground that the purpose to commit suicide was expressed at a time remote from the death.

§ 278. **Same subject—Mutual Life Insurance Co. v. Hillmon.**—One of the most important adjudications in recent years on the law of evidence is that of *Mutual Life Insurance Co. v. Hillmon*.³ In that case suit was brought against the defendant insurance company on a policy issued to the plaintiff insuring the life of her husband, John W. Hillmon. The plaintiff introduced evidence tending to show that her husband was killed, while in camp in a remote part of Kansas, by the accidental discharge of a gun. The defense introduced evidence tending to show that the body found was that of his associate, Frederick Adolph Walters. The court held on appeal that letters were admissible in evidence, written by Walters to friends, in which he in substance announced his intention of starting *in a few days* upon the journey with Hillmon. In holding these letters competent the court said: "A man's state of mind or feeling can only be manifested to others by countenance, attitude or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. *When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of intention. But whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous, oral or written declarations.* The letters in question were competent, not as narratives of facts communicated to the writer by others, nor

¹ *Boyd v. State*, 14 Lea 161; *Blackburn v. State*, 23 Ohio St. 146.

² *Siebert v. People*, 143 Ill. 571, 32 N. E. Rep. 431.

³ *Mut. Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909.

yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it the more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention."

§ 279. Declarations by deceased persons of other facts.—

As we have already seen, the fact that a person is deceased, and therefore can not testify, does not, of itself, warrant the introduction of hearsay evidence. For this reason, many important disclosures of substantive facts made by deceased persons, their mental state not being in issue and the declarations not being connected with any litigated fact, are necessarily excluded. An Indiana case¹ well illustrates this proposition. In the case referred to, the following statement of the deceased, made a few minutes before he was killed, was held incompetent: "Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life. I want you to go back with me."² In a New Jersey case,³ the court ruled that it was admissible to introduce in evidence a note written by the deceased to his wife, a few hours before leaving home, and on the night that the murder occurred, in which he stated that he was going to a certain city, and that the defendant would accompany him.⁴ The court put its ruling largely on the ground that the communication was a natural act to which there could attach no suspicion of an ulterior purpose. On the other hand, upon a subsequent appeal of a case already mentioned, in which the defendant stated he was going to Pine Mountain,⁵ the case was reversed, because,

¹ Cheek v. State, 35 Ind. 492.

³ Hunter v. State, 40 N. J. L. 495.

² To the same effect, see Montag v.

People, 141 Ill. 75, 30 N. E. Rep. 337.

In Schoolcraft v. People, 117 Ill. 271, 7

N. E. Rep. 649, and People v. Irwin,

77 Cal. 494, 20 Pac. Rep. 56, it was held

that a statement by a deceased person

as to his fears was incompetent.

⁴ The cases of State v. Dula, Phillips

(N. C.) Law, 211, and Territory v.

Couk, 2 Dak. 188, 47 N. W. Rep. 395,

hold similar statements admissible.

⁵ Kirby v. State, 9 Yerg. 383, 30 Am.

Dec. 420.

on the second trial, evidence was introduced of the statement of the deceased that the defendant was to be his companion. In reversing the case the court said: "Whether Kirby was to accompany him or not could not affect his intentions in going to the mountain, nor could his statement of that fact tend to explain his purpose in going there. His declaration of his own purpose is evidence because it explains his intentions, and his intentions constitute a part of the thing he was doing.

* * * But it is impossible that Kirby's going with him could constitute any part of the thing which he was doing, which was his own journey." To comment upon this case, it may be said that it is difficult to discriminate between a declaration of a purpose to go to a certain place and a declaration of an intent to accompany another to that place. Doubtless, as suggested in *Mutual Life Insurance Co. v. Hillmon*,¹ the declaration could only be treated as suppletory to other evidence, for the principal act must always be established by direct proof,² but it would seem reasonably clear, in the light of other authorities, that the evidence ought to serve the function of *res gestæ*. The court in the case under consideration drops into the rather common error of overlooking the fact that the condition of the mind, where material to be considered, is itself a principal fact, which may be explained by declarations. *People v. Williams*³ is a case in which a like statement was held inadmissible by Denio, J., the reason assigned being that the evidence was offered "to induce the jury to infer another act not otherwise shown to exist, that of his being in company with the deceased."

§ 280. **Declarations showing fraud.**—In this class of cases mental condition is the most important element, and as fraud is not only a subjective matter but seeks to hide itself, it is evident that the courts must give a range to the investigation which is only limited to reasonable inferences on the one side

¹ *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909.

² *People v. Williams*, 3 Abb. N. Y. Ct. of App. Dec. 596.

³ *White v. Rayburn*, 11 Ore. 450, 5 Pac. Rep. 345.

and a consideration of the rights of the beneficiary of the act, if he be an innocent person, on the other. There is a line of English cases in which declarations disconnected with any act, made by persons leaving the realm, are held competent as tending to prove that the act of leaving was an act of bankruptcy.¹ It is upon this line of cases that Mr. Taylor, in his work on evidence, bases his proposition already quoted that declarations need not be concurrent in point of time. The first of these cases, *Bateman v. Bailey*,² has been charged, by a writer in the *American Law Review*,³ with the parentage of *Com. v. McPike*,⁴ *Insurance Company v. Mosely*,⁵ and the rest of that brood of ill-considered cases in which hearsay statements have been admitted in evidence under the guise of *res gestæ*. But it is suggested that the learned critic has overlooked the fact that the English cases he criticises involve questions as to the state of the mind at a given time, and are to be broadly distinguished from cases where the *res gestæ* is admitted merely as illustrative of an overt act into which intent does not enter. In a comparatively recent case⁶ the Supreme Court of the United States has recognized this line of English cases as correct adjudications, and has put the admissibility of that class of declarations upon the right ground.⁷ The admissibility of declarations by alleged fraudu-

¹ *Bateman v. Bailey*, 5 T. R. 512; *Rawson v. Haigh*, 9 Moore 217, 2 Bing. 99; *Smith v. Cramer*, 1 Scott 541, 1 Bing. N. C. 585.

² *Bateman v. Bailey*, 5 T. R. 512.

³ Article on *Bedingfield's Case*, 14 Am. L. Rev. 817, 15 Am. Law Rev. 1, 71.

⁴ *Com. v. McPike*, 3 Cush. 181.

⁵ *Ins. Co. v. Mosely*, 8 Wall. 397.

⁶ *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909.

⁷ The case of *Smith v. National Benefit Assn.*, 123 N. Y. 85, 25 N. E. Rep. 197, is a case which is strongly illustrative of the lengths courts must go in the pursuit of evidence in cases where the inquiry relates to the pur-

poses of a mind, and where that mind has made careful effort to conceal the evidence of its purposes. The case mentioned was a suit on a life insurance policy insuring the life of one Tyler in favor of the plaintiff, who was his creditor. The insurance was procured by Tyler. The company defended on the theory that the deceased had taken out the insurance with the fraudulent purpose to commit suicide and that he had consummated such purpose. In discussing the admissibility of the acts and declarations of Tyler prior to the taking out of the insurance the court said: "The evidence serves to indicate the origin

lent grantors will be considered in a subsequent portion of this chapter.¹

§ 281. **Declarations of testator.**—In cases where the courts are called on to gauge the mental capacity of a testator, not only are his contemporaneous declarations evidence, but his prior and subsequent declarations are also admissible.² There

and motive of the alleged suicidal intent, which grew to be the effective agency of the fraud. In the same connection the witness was permitted to detail inquiries which Tyler made of Sutkin as to the easiest mode of producing death. These inquiries were rather acts than declarations, and show the assured in the process of acquiring information to effect easily and swiftly the destruction of his own life. Similar testimony of an intent to commit suicide, rather than endure poverty or hard labor, was given by the witness, Trested, but in connection with inquiries about insurance, and with an endeavor to get into a benefit society connected with the hat trade. The witness added Tyler's declaration that he intended to put a large insurance upon his life, and make the boys happy. These acts and declarations all occurred before the plaintiff took his policy as collateral, and when they affected no one but Tyler himself. They tended to show the origin and progress of the fraudulent intent, the manner of its growth, and the motive from which it sprang. They indicate a sane and deliberate purpose, moving steadily to its result, and constitute a part of the history of the fraud. They were contemporaneous with the fraud in its formative stages; they accompanied Tyler's efforts to raise money, which failed, and to procure an insurance upon his life which he knew he could

not continuously maintain. They show the motive of the fraud, and mark its progress, and harmonize so completely with all which afterwards occurred as to constitute, with that element of the single transaction, the fraudulent conduct which raised the issue presented by the defense. And so I think the proof came fairly within the rule relating to the *res gestæ*, and did not transcend its limits. Some of this evidence was resisted upon the ground that death by suicide was no defense under the terms of the policy. That is true, but the defense was fraud, and suicide the ultimate agency by which the fraud was accomplished. It was necessary, therefore, to prove it, and in such manner as to indicate that it was not an insane or sudden impulse, but the culmination and effective working out of a deliberately conceived purpose of fraud. We think no error was committed in the admission of the evidence upon which the jury acted." Some discussion of the admissibility of proof of collateral fraud will be found in the chapter on Collateral Evidence.

¹ *Post*, § 288.

² In *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, Selden, J., offers the following criticism upon Professor Greenleaf's statement of the law upon this subject: "Mr. Greenleaf, in his work on evidence, in treating of the invalidity of wills, in consequence of the insanity or mental imbecility of

is a special reason why prior declarations are competent in such cases: this results from the fact that where chronic insanity is once shown to exist, its continuance is presumed. If a declaration throws any light upon the question as to a testator's mental condition, it is not to be rejected merely because in form the statement may be incompetent, for it can be disregarded as substantive evidence of the fact stated, and only regarded for the purpose which makes it admissible.¹ The investigation of an issue of fraud or undue influence often requires an inquiry into the strength of the mind of the testator, and for that purpose evidence may be introduced in such cases of his declarations,² but such statements, unless comprehended within the *res gestæ* of the execution of the will, are incompetent, as statements of substantive facts, to prove fraud or undue influence.³

the testator, says: 'In the proof of insanity, though the evidence must relate to the time of the act in question, yet evidence of insanity immediately before or after the time is admissible. Suicide, committed by the testator soon after making his will, is admissible as evidence of insanity, but is not conclusive,' and in the same section he adds: 'The declarations of the testator himself are admissible only when they were made so near the time of the execution of the will as to become a part of the *res gestæ*,' and he refers for the last proposition to *Smith v. Fenner*, *supra*, 2 Greenleaf on Ev., § 690. Nothing could be more incongruous than the different branches of this section. To say that the insanity of the testator subsequent to the making of the will may be proved, but that the declarations of the testator are inadmissible for the purpose of proving it, is not a little extraordinary. It admits the fact, but excludes the most common and appropriate evidence to establish it."

¹ *Shailer v. Bumstead*, 99 Mass. 112; *Rambler v. Tryon*, 7 Serg. & R. 90, 10

Am. Dec. 444, *McTaggart v. Thompson*, 14 Pa. St. 149; *Dennis v. Weekes*, 51 Ga. 24.

² 1 Jarman on Wills, 36; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71.

³ *Jackson v. Kniffen*, 2 Johns. 31, 3 Am. Dec. 390; *Bates v. Bates*, 27 Iowa 110, 1 Am. Rep. 260; *Comstock v. Hadlyme, etc., Society*, 8 Conn. 254, 20 Am. Dec. 100; *Moritz v. Brough*, 16 S. & R. 403; *Gibson v. Gibson*, 24 Mo. 227; *Hayes v. West*, 37 Ind. 21; *Conway v. Vizzard*, 122 Ind. 266, 23 N. E. Rep. 771. In *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71, the court said: "The difference is certainly very obvious between receiving the declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while in the latter, it is the most direct and appropriate species of evidence."

The imperfectly reported case of *Nelson v. Oldfield*¹ would seem to be an authority in opposition to the last proposition, but the cases in this country are practically a unit in holding to the doctrine laid down above. A testator can not, of course, abrogate the statute and revoke his will by mere declarations,² but such evidence is competent if it is a part of the *res gestæ* of the overt act of revocation.³ Statements by testators are often sought to be introduced as admissions, upon the theory that while yet in life their declarations affect no vested interests but their own. It is entirely settled, however, as the testator is not a party to a contest concerning his will, that no statement of his can be introduced on the ground that it is an admission.⁴ Such statements are not in the nature of declarations in disparagement of title, but they are to be likened to the declarations of a grantor, after grant, in limitation of his grant, and are strictly hearsay.⁵ Moreover, public policy demands that the exercise of the important privilege of directing the transmission of property after death, hedged about, as it is, by rigorous statutory provisions designed to prevent imposition, should not, when the testator can no longer speak, be rendered nugatory by means of parol evidence. Even declarations which are strictly contemporaneous with the execution of the instrument are discarded where the purpose of their introduction is to contradict the instrument, because "a will must be understood to contain the testator's whole mind and intention on the subject-matters of the devise."⁶ "This exclusion," says Mr. Redfield

¹ *Nelson v. Oldfield*, 2 Vern. 76.

² *Jackson v. Kniffen*, 2 Johns. 31, 3 Am. Dec. 390; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Randall v. Beatty*, 31 N. J. Eq. 643; *Lewis v. Lewis*, 2 Watts & S. 455; *Hargroves v. Redd*, 43 Ga. 142; *Rodgers v. Rodgers*, 6 Heisk. 489; *Gay v. Gay*, 60 Iowa 415, 14 N. W. Rep. 238, 46 Am. Rep. 78, *Hoitt v. Hoitt*, 63 N. H. 475, 3 Atl. Rep. 604; *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. Rep. 22—Ev.

620; *Stevens v. Vancleve*, 4 Wash. C. 262; *Hayes v. West*, 37 Ind. 21; *Mooney v. Olsen*, 22 Kan. 69; *In re Pemberton*, 40 N. J. Eq. 520, 4 Atl. Rep. 770, affirmed, *Pemberton v. Pemberton*, 41 N. J. Eq. 349, 7 Atl. Rep. 642; *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395.

³ See cases in preceding note.

⁴ 1 Redfield on Wills, star p. 538.

⁵ *Mooney v. Olsen*, 22 Kan. 69.

⁶ 2 Phil. on Ev. (1849 ed.) 350.

in his work on wills,¹ "rests upon the general principle declared in all the reports, from Cheney's Case to the present day, that no parol evidence can be received to contradict, explain, supply, enlarge or qualify the words of a will, nor to explain the intention of a testator, except in the instance of a latent ambiguity, arising *de hors* the instrument, either as to the subject or the object of a bequest, and to rebut a resulting trust." Many instances are afforded by the cases of declarations by testators which have been held competent, but, aside from statements accompanying equivocal acts, the character of which is drawn in question, it will be found that in each instance the declaration owes its competency to the fact that it sheds light on the testator's mental condition,² or aids in the designation of the subject or object of the devise, or is supplementary of the will, or rebuts an equity, or tends to countervail the effect of evidence of the latter character.³

§ 282. *The res gestæ in questions of domicile.*—Questions of domicile often require a minute inquiry into the particulars of private life. Habits, character, business, social and domestic relations, are often comprehended within the *res gestæ*.⁴ Declarations upon this subject, to be competent, must be explanatory of acts,⁵ and should ordinarily accompany, or be

¹ Star p. 539.

² A discussion of the question as to how far courts will go in their efforts to effectuate the true intent of the testator as shown upon the face of the will, would carry us too far afield. A valuable note on this subject follows the case of *Goode v. Goode*, 22 Mo. 518, as reported in 66 Am. Dec. 630.

³ *Moore v. McDonald*, 68 Md. 321, 12 Atl. Rep. 117; 1 Redfield on Wills, star p. 568; 2 Whart. on Ev., § 1012.

⁴ 2 Taylor on Ev., § 1203, *et seq.*; 1 Redfield on Wills, star p. 593, *et seq.*; 2 Whart. on Ev., § 992, *et seq.* Declarations of an ancestor to show an advancement must be limited to those

made before, at the time of, or so soon after the act, as to be within the *res gestæ*. *Harness v. Harness*, 49 Ind. 384; *Thistlewaite v. Thistlewaite*, 132 Ind. 355, 31 N. E. Rep. 946. In *Zeigler v. Eckert*, 6 Pa. St. 13, 47 Am. Dec. 428, it was held that the declarations of a testator both before and after the execution of a will were competent to fortify the presumption of the ademption of a legacy.

⁵ *Fulham v. Howe*, 62 Vt. 386, 20 Atl. Rep. 101; *Hallet v. Bassett*, 100 Mass. 167; *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650.

⁶ *Gourlay v. Gourlay*, 15 R. I. 572, 10 Atl. Rep. 592.

closely associated with, a more or less ambiguous act, which it is material to inquire into.¹

§ 283. **Evidence of affection—Proof of marriage.**—Where it is material to prove the feelings of an individual towards another at a certain time, it is proper to receive in evidence the expressions used by the individual, so far as the same are indicative of such feelings. And so in actions for criminal conversation, the declarations of the wife showing the terms upon which she lived with her husband are regarded as original evidence,² but to avoid the danger of collusion, such declarations as are made by the wife subsequent to her misconduct are excluded.³ The fact that a man and woman appear and are received in society as man and wife, their cohabitation, the recognition of their offspring as legitimate, and their conduct towards each other generally, constitute competent evidence of the marriage relation.⁴ The admission of such evidence may rest on different grounds in different cases, as, for instance, as against one of the parties, his own conduct may be looked upon as an admission; or conduct indicative of marriage may

¹ *Wright v. City of Boston*, 126 Mass. 161; *Pickering v. City of Cambridge*, 144 Mass. 244, 10 N. E. Rep. 827; *Viles v. City of Waltham*, 157 Mass. 542, 32 N. E. Rep. 901, 34 Am. St. Rep. 311; *Fulham v. Howe*, 62 Vt. 386, 20 Atl. Rep. 101. See *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909; *Bateman v. Bailey*, 5 T. R. 512; *Rawson v. Haigh*, 9 Moore 217, 2 Bing. 99; *Smith v. Cramer*, 1 Scott 541, 1 Bing. N. C. 585.

² *Trelawney v. Coleman*, 1 B. & Al. 90; *Winter v. Wroot*, 1 M. & Rob. 404; *Elsam v. Faucett*, 2 Esp. 562; *Thompson v. Trevanion*, Skin. 402; *Gilchrist v. Bale*, 8 Watts 355, 34 Am. Dec. 469; *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. Rep. 909.

³ *Wilton v. Webster*, 7 Car. & P. 198; *Edwards v. Crock*, 4 Esp. 39;

Trelawney v. Coleman, 1 B. & Ald. 90; *Houliston v. Smyth*, 2 C. & P. 22. It was held, in *State v. Punshon*, 124 Mo. 448, 27 S.W. Rep. 1111, and *State v. Swift*, 57 Conn. 496, 18 Atl. Rep. 664, where the defendant was charged with the murder of his wife, that he could not prove his declaration, made prior to the homicide, that he was greatly attached to his wife.

⁴ *Gaines v. Relf*, 12 How. 472; *Thorndell v. Morrison*, 25 Pa. St. 326; *Bissell v. Bissell*, 55 Barb. 325; *Owens v. State*, 94 Ala. 97, 10 So. Rep. 669; *Harman v. Harman*, 16 Ill. 85, 2 Greenleaf on Ev., § 462. Such evidence is not competent, except possibly by way of suppletory proof, in criminal actions like bigamy, where proof of an actual marriage is regarded as a part of the *corpus delicti*.

amount to proof of that fact under the maxim *omnia præsumuntur rite esse acta*; or, in case secondary evidence is admissible, the conduct of the parties may amount to declarations of pedigree, but in nearly every case the claim for the admissibility of the evidence may also be placed on the ground that it is a part of the *res gestæ*.

§ 284. **Certain analogous *res gestæ* topics suggested but considered elsewhere.**—The subject of the competency of proof of declarations and acts to show mental state or intent has now been considered at some length, but the subject is not exhausted; in fact it opens up a vista of topics, such as motive, threats, collateral circumstances and other topics, which might be treated as *res gestæ*. It is deemed that the arrangement of this volume will be more practical, if not more logical, if many of these topics are considered in other connections. The prime purpose of a number of preceding sections, and of the suggestion of the *res gestæ* topics mentioned in this section, has been to enforce upon the professional mind the fact that in inquiries involving mental state or intent “it is impossible,” in the language of Best, C. J., already quoted, “to tie down to time the rule as to the declarations.” In none of the classes of cases mentioned is the doctrine discarded that the act or declaration sought to be shown must be connected with the principal act, but when a court must perforce ascertain the mental state of a person at a particular time, it must do so much as an individual would trace the course of a subterranean stream, by its surface manifestations. Such a stream sinks into the ground, and a short distance further a stream of about the same volume, and seemingly flowing in the same direction as the first, appears, and the inference is drawn that it is the same stream; and so with declarations separated from the main act in questions of mental state—the two must be connected, if the declaration is admitted, but the connection between the two, because of the subjective character of the investigation, is necessarily one of inference.

§ 285. **A limitation upon declarations where mental state is involved.**—The doctrine of declarations as indicative of mental state narrows considerably where the declarant is a party to the suit and seeks to introduce such declarations in his own favor. If the “mind stands in an even position, without any temptation to exceed or fall short of the truth” some latitude may be given to the admission of declarations, but it is, no doubt, a good practical rule, subject to few exceptions, to exclude all declarations by a party not made *ante litem motam*, except where so closely associated with a material, equivocal act as to make it reasonably certain that the two are connected. As laid down by the Supreme Court of Massachusetts:¹ “The danger that declarations may have been made for a purpose, when they are sought to be introduced in evidence in favor of the person making them, has led to the exclusion of them, even on the issue of what was the intention or state of mind of the declarant, unless they are made under such circumstances as to give them some corroboration. In general such corroboration is found in the fact that they accompany and explain acts which of themselves would be competent evidence on the issue involved. They are then admissible as a part of the *res gestæ*.”

§ 286. **The *res gestæ* in business transactions.**—The rule concerning the admissibility of the *res gestæ* is frequently invoked where courts have occasion to inquire into business transactions. In this class of cases, however, the rule meets with a considerable limitation because of the counter rule that in the absence of fraud or mistake a written contract, as between the parties, merges all prior oral negotiations leading up to its execution. In case, however, of a lost instrument, where it is material to ascertain its contents, the declarations of the parties at the time of its execution have been held admissible.² In questions of fraud or *bona fides* it is proper to

¹ *Viles v. City of Waltham*, 157 Mass. 542, 32 N. E. Rep. 901, 34 Am. St. Rep. 311. ² *Kent v. Harcourt*, 33 Barb. 491.

admit the conversation which attended the negotiation, in order to obtain a view of the whole transaction.¹ In one case, where the defendant was charged with fraudulently representing in the sale of a mortgage that it was a first mortgage, it was held proper for him to prove that when the mortgage was made out (presumably as tending to show his supposition that he was obtaining a first lien), he stated to the mortgagor that he did not want a covenant in the instrument against incumbrances, as that might prejudice its sale.² Whenever there is a material fact of a business nature, the character of which is in question, it is proper to show the accompanying declarations by the parties to the transaction. Where a person went upon a piece of land and surveyed it, it was held competent to prove that he then declared his intent to take possession, the question of intent being material.³ So in another case it was held proper to introduce the accompanying declarations to elucidate the character of a delivery of property.⁴ An interesting case on the subject of business declarations is *Monroe v. Snow*.⁵ In that case the controversy was as to whether the defendants had authorized plaintiffs to sell their property at the reduced price of \$90,000. One of the plaintiffs had testified to such authority, and it was held competent for him to further testify, and introduce his sales book in corroboration of his statement, that at the time such authority was given, and in the presence of the defendant, he opened the book at the place where the property was already listed and entered the date, October 31, 1885, and a cipher mark indicating to witness

¹*Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194; *Bank v. Kennedy*, 17 Wall. 19; *Sanger v. Colbert*, 84 Tex. 668, 19 S. W. Rep. 863. In a suit to set aside a conveyance as fraudulent, evidence was held admissible on behalf of the grantee, who was the wife of the grantor, that when she learned that a prior conveyance of the property had been taken in her husband's name, she declared that her money paid for it, and demanded that the

land should be conveyed to her by her husband which was done on the same day. *Mitchell v. Colglazier*, 106 Ind. 464, 7 N. E. Rep. 199.

²*Cronkhite v. Dickerson*, 51 Mich. 177, 16 N. W. Rep. 371. Cooley, J., dissented.

³*Stephen v. McCloy*, 36 Iowa 659.

⁴*Fellman v. Smith*, 20 Tex. 99.

⁵*Monroe v. Snow*, 131 Ill. 126, 23 N. E. Rep. 401.

and his partner that the property might be sold for \$90,000.¹ This case should be distinguished from a line of cases elsewhere mentioned,² holding a mere memorandum to be inadmissible, for the reason that in the above case the placing of the mark upon the book was a part of the transaction itself. Even what third parties say to a person, provided the evidence shows that their statements were acted on, may be admissible, where the admission of such declarations tends to prove good faith. Thus, in a Massachusetts case, evidence was permitted, in order to prove good faith, that a certain statement was made, on the margin of a note, by the instruction and advice of the comptroller.³

§ 287. *The res gestæ in criminal cases.*—Where an act is one of alleged criminality, and the accompanying declaration tends to elucidate and explain the act and show it to be innocent, the declaration is admissible in evidence.⁴ A person who is charged with larceny may explain the circumstances of his possession, by showing the negotiation under which he obtained the property.⁵ And he may also show his declarations when found in such possession. The act of coming into the

¹ See also *Reviere v. Powell*, 61 Ga. 30, 34 Am. Rep. 94. In *North Bank v. Abbot*, 13 Pick. 465, the question was whether notice of non-payment had been given to the indorsee of a note. The bank messenger had absconded. An entry in his book showed the name of such indorsee, followed by a cipher mark which indicated, according to the custom of the bank, that the indorsee had been notified. Held proper.

² *Ante*, § 186.

³ *Corcoran v. Batchelder*, 147 Mass. 541, 18 N. E. Rep. 420.

⁴ *Mack v. State*, 48 Wis. 271, 4 N.W. Rep. 449; *Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22. In the latter case the defendant was prosecuted for robbery. It was held proper for the

defendant to prove that at the time he attacked the prosecuting witness he declared that three years before he had been assaulted by the latter, and that he was then having his revenge for it.

⁵ *State v. Jordan*, 70 Iowa 760, 29 N. W. Rep. 430. In *Com. v. O'Connor*, 11 Gray 94, the evidence showed that a drainer—an implement used in the liquor traffic—was found in the defendant's possession, and that circumstance was relied on, among others, as proof of the fact that he was a common seller. The court held that it was proper for the defendant to show the direction he gave to the maker as to the form in which he desired it, and his accompanying declaration as to the purpose he intended it for.

possession of stolen property, and being found in such possession (from either of which a presumption may arise that such possessor is the thief), are acts of an equivocal character, which the defendant is entitled to explain by his contemporaneous declarations, but the weight of authority excludes his declarations in the meantime, for the reason that the defendant is not especially called on to explain his possession in the interim, and, since such an explanation is as likely to be born out of a calculating policy on the part of the defendant as otherwise, it is deemed best to exclude the declaration.¹ Where the evidence on behalf of the defendant tended to show that at the time of the larceny of a valise and contents he was in another state, it was held that he was entitled to prove that upon his return home, and as soon as he discovered the valise, he asked his wife the question, "Whose valise is that?"² So, in a Michigan larceny case, where the state proved that the defendant drove the stolen horse and buggy to a certain livery stable, the court held that the defendant might show the explanation made at the time, on the ground that the state had proved a material equivocal act, and the defendant was entitled to the accompanying explanation.³ It is not the intention at this time to discuss the law concerning proof of collateral crime,⁴ but it may be here said that where immediately after the making of an assault upon one person the defendant assaults another, the latter act is a part of the *res gestæ* of the former, at least if it tends to explain the former act or is necessary to a full understanding of it.⁵

¹ *Hampton v. State*, 5 Tex. Ct. App. 463; *Henderson v. State*, 70 Ala. 23, 45 Am. Rep. 72; 2 Bishop's Cr. Pro. 746. See *State v. Young*, 41 La. Ann. 94, 6 So. Rep. 468; *Stockman v. State*, 24 Tex. App. 387, 6 S. W. Rep. 298; *Goens v. State* (Tex. Cr. App.), 31 S. W. Rep. 656.

² *Henderson v. State*, 70 Ala. 23.

³ *People v. Shepard*, 70 Mich. 132, 37 N. W. Rep. 925.

⁴ *Ante*, § 57.

⁵ *People v. Pallister*, 138 N. Y. 601, 33 N. E. Rep. 741; *State v. Gainor*, 84 Iowa 219, 50 N. W. Rep. 947; *Smith v. State*, 88 Ala. 73, 7 So. Rep. 52. See *People v. Cunningham*, 66 Cal. 668, 4 Pac. Rep. 1144, 6 Pac. R. 700 and 846; *State v. Craemer*, 12 Wash. 217, 40 Pac. Rep. 944.

§ 288. **Declarations of grantor where fraud is charged.**—It is to be recollected that a person who seeks to set aside a conveyance as fraudulent takes upon himself the affirmative of a dual issue, namely, the fraud of the grantor, and the purchase by the grantee under circumstances that vitiated the conveyance. As respects the first issue, it is apprehended that any act or declaration of the grantor may be shown which would be reasonably comprehended within the *res gestæ* of any inquiry where intent was involved.¹ There is a want of harmony in the cases as to the extent of the right to prove the prior acts and declarations of the grantor, in the absence of the grantee, and while it is clear that the remote acts and declarations of the former are to be excluded as *res inter alios acta*, yet a perusal of the preceding pages of this chapter, and a study of the cases cited in support of the text, will show that the *res gestæ* of the inquiry in fraudulent conveyance cases is much broader than the circumstances immediately connected with the actual transfer. In this connection the rule, heretofore dwelt upon,² is to be recollected, that wherever a material, equivocal act is shown, it is proper to show the accompanying declarations of the parties to it. There are a few authorities which sanction the introduction of the mere admissions of the grantor to establish the issue of fraud as to him.³ This does not seem like the correct view. While it is true, as already stated, that the issue is a dual one, yet that does not mean that it is proper to prove the fraud of the grantor by any evidence which would be competent as to him alone, and that then, if evidence can be found sufficient to infect the grantee with such alleged intent on the part of the grantor, the issue of fraud is sufficiently proved. It is of the last importance to

¹ Klein v. Hoffheimer, 132 U. S. 367, § 280. Other transfers of property 10 Sup. Ct. Rep. 130; Pease v. Batten, by the debtor at or about the same 56 Hun 643, 9 N. Y. Supp. 621; Taylor time are competent to show his intent. Ante, § 80.

v. Robinson, 2 Allen 562; Lowe v. Dalrymple, 117 Pa. St. 564; O'Hare

v. Duckworth, 4 Wash. 470, 30 Pac. Rep. 724; Grimes v. Hill, 15 Colo. 359, 25 Pac. Rep. 698; Bump on Fraudulent Conveyances, 582, ante

² Ante, § 242.

³ Hogan v. Robinson, 94 Ind. 138; Hunsinger v. Hofer, 110 Ind. 390, 11 N. E. Rep. 463; Sloan v. Coburn, 26 Neb. 607, 42 N. W. Rep. 726.

the rights of the grantee that the grantor's fraud, if any, shall only be established by evidence which will bind him, the grantee. He has traversed the allegation that the grantor made the conveyance with a fraudulent intent, and of a surety the grantee is entitled to insist that his denial shall only be overcome by competent proof as to him.¹ When the conveyance is a completed transaction, there is another reason why the grantor's declarations (that is, such declarations as are not *res gestæ*) ought not to be received, and that is that the grantor can not be permitted to impeach his own conveyance.² Two exceptions exist as to this rule: First, where it is shown by the evidence that there is a subsisting conspiracy³ and according to the better doctrine the declarations must be made pursuant to, and in the execution of, the common design;⁴ second, where the grantor is permitted to remain in possession of the property. This is put on the ground that the grantor's continued management shows those acts which naturally and usually flow

¹ *Gates v. Mowry*, 15 Gray 564; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Bump on Fraudulent Conveyances*, 587, and cases cited. See, *ante*, § 31. In *McDowell v. Goldsmith*, 6 Md. 319, 61 Am. Dec. 305, subsequent declarations were admitted as against the grantee in a case where they were made so soon after the transfer as to be approximately within the *res gestæ*. And see, to same effect, *Klein v. Hoffheimer*, 132 U. S. 367, 10 Sup. Ct. Rep. 130.

² *Farmers' Loan and Trust Co. v. Montgomery*, 30 Neb. 33, 46 N. W. Rep. 214; *Koch v. Lyon*, 82 Mich. 513, 46 N. W. Rep. 779; *Adler v. Apt*, 30 Minn. 45, 14 N. W. Rep. 63; *Joseph v. Furnish*, 27 Ore. 260, 41 Pac. Rep. 424; *Chase, Admr., v. Horton*, 143 Mass. 118, 9 N. E. Rep. 31; *Crust v. Evans*, 37 Kan. 263, 15 Pac. Rep. 214; *Ganong v. Green*, 71 Mich. 1, 38 N. W. Rep. 661; *Benson v. Lundy*, 52 Iowa 265, 3 N. W. Rep. 149; *Allen v. Kirk*, 81 Iowa 658, 47 N. W. Rep. 906;

³ *Bump on Fraudulent Conveyances*, 585; *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. Rep. 463; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Joseph v. Furnish*, 27 Ore. 260, 41 Pac. Rep. 424; *Souder v. Schechterly*, 91 Pa. St. 83; *De France v. Howard*, 4 Iowa 524.

⁴ *Allen v. Kirk*, 81 Iowa 658, 47 N. W. Rep. 906; *Rogers v. Thurston*, 24 Neb. 326, 38 N. W. Rep. 834. See, *ante*, § 28.

from, accompany and tend to evince ownership, and therefore his declarations are competent in explanation of his possession.¹ In a Vermont case² where it was claimed that a judgment was collusive, and the proof showed that the execution plaintiff had for a long time permitted his execution to lie dormant, it was held that the trial court properly received evidence that the execution defendant had repeatedly stated that he was as much the owner of the land as he was before the levy. In disposing of the question the court said: "We see no reason why one who, upon taking the title to real estate, leaves the former owner in the complete control and enjoyment which ordinarily accompany ownership, should not be required to meet in evidence, when the validity of the transaction is questioned, the declarations made in connection with, and in characterization of, the possession thus permitted."³

§ 289. **Declarations of person in possession in favor of himself or another.**—This subject is one which the cases have to a considerable extent tended to confuse, although, upon a careful consideration, the principle upon which the doctrine rests will be apparent. It is this: Whenever it becomes material to examine into an equivocal act, the declarations of the actors which accompany that act are *res gestæ*. This rule finds frequent application in cases involving the character of the possession of real or personal property. In an ejectment or

¹ See next section. *Redfield v. Buck*, 35 Conn. 328, 95 Am. Dec. 241; *Merriam v. Swensen*, 42 Minn. 383, 45 N. W. Rep. 960; *Spalding v. Albin*, 63 Vt. 148, 21 Atl. Rep. 530; *Pomeroy v. Bailey*, 43 N. H. 118; *Hardy v. Moore*, 62 Iowa 65, 17 N. W. Rep. 200; *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. Rep. 838; *Bump on Fraudulent Conveyances*, 589, and cases cited; *Tedrowe v. Esher*, 56 Ind. 443; *Daniels v. McGinnis*, 97 Ind. 549; *Loos v. Wilkinson*, 110 N. Y. 195, 18 N. E. Rep. 99; *McDonald v. Bowman*, 40 Neb. 269, 58 N. W. Rep. 704.

² *Spalding v. Albin*, 63 Vt. 148, 21 Atl. Rep. 530.

³ Where an action was brought to condemn certain diamonds as forfeited under the customs revenue law, and it appeared that if the claimant was the owner, he must have put the diamonds into the custody of one S., it was held that her declarations at the time of the investigation and seizure by the officers were competent evidence. *Friedenstein v. United States*, 125 U. S. 224, 8 Sup. Ct. Rep. 838.

replevin case the question would ordinarily be one of title, in which the element of the character of the possession would be immaterial. In such a case the admission of evidence of declarations relating to the possession or ownership would be clearly improper, but if the question arose, under a plea of the statute of limitations, as to whether defendant's possession was adverse, or whether he held in his own right, his contemporaneous declarations would afford the best manifestation thereof, and would therefore be competent.¹ In a case where the evidence discloses that some third person is in possession of the property, his possession unexplained would afford some evidence of title in himself, and, therefore, the quality of his possession coming in issue, it is proper to show the declaration of the possessor that one of the claimants, or some third person, is the owner of the property.² Where the character of the possession is not in issue, such evidence is incompetent.³ To be admissible, the declaration must be made at the time of

¹ *Jackson v. McVey*, 15 Johns. 234; *Brown v. Kohout*, 61 Minn. 113, 63 N. W. Rep. 248; *Lamoreux v. Huntley*, 68 Wis. 24, 31 N. W. Rep. 331; *Lochhausen v. Laughter*, 4 Tex. Civ. App. 291, 23 S. W. Rep. 513. See *Sparrow v. Hovey*, 44 Mich. 63. The payment of taxes has been characterized as "powerful evidence" of a claim of right. *Wren v. Parker*, 57 Conn. 529, 18 Atl. Rep. 790, 14 Am. St. Rep. 127, and see *Ewing v. Burnet*, 11 Pet. 41; *Farrar v. Fessenden*, 39 N. H. 268; *Paine v. Hutchins*, 49 Vt. 314.

² *Avery v. Clemons*, 18 Conn. 306, 46 Am. Dec. 323; *Bradley v. Spofford*, 23 N. H. 444, 55 Am. Dec. 205; *Doe v. Pettett*, 5 B. & Ald. 223; *Doe v. Rickarby*, 5 Esp. 4; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Kirkland v. Trott*, 66 Ala. 417; *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194, and see the many cases cited in *People v. Vernon*, 35 Cal. 49, 95 Am.

Dec. 49, 70, 71. See preceding section as to declarations of possessor in his own favor. In *Cobbey on Replevin*, § 987, it is said: "Declarations of a party in possession, or explanatory of the title he is claiming, may be given in evidence by himself or those holding under him, where either of these matters is properly in issue. But they are proof only that such was the character of the possession or such was the title claimed. They are no evidence of the title actually held; and where the issue is not what was the nature of the possession, nor what was the title claimed, but which party, plaintiff or defendant, was the actual owner, such declarations are inadmissible."

³ *Robbins v. Spencer*, 140 Ind. 483, 40 N. E. Rep. 263, 38 N. E. Rep. 522; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Charter v. Lane*, 62 Conn. 121, 25 Atl. Rep. 464.

the possession,¹ and be simply explanatory of it; a statement as to the circumstances of the acquisition would be merely narrative and not *res gestæ*.²

§ 290. **Declarations of by-standers.**—Declarations connected with a litigated act are admitted for the purpose of testing the particular quality of the act. This being the purpose of the evidence, it is evident that, at least in most cases, the act must speak through the participants.³ The rule is inflexible that to admit a declaration the person uttering it must be so related to the transaction under inquiry as to make his declaration a part of it.⁴ The comments and criticisms of mere observers can not be proved.⁵ If the question can be said to be an open one upon the authorities, it might be suggested that where an

¹ *Charter v. Lane*, 62 Conn. 121, 25 Atl. Rep. 464.

² *Hoover v. Cary*, 86 Iowa 494, 53 N. W. Rep. 415; *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491; *Martin v. Hardesty*, 27 Ala. 458, 62 Am. Dec. 773; *Ray v. Jackson*, 90 Ala. 513, 7 So. Rep. 747.

³ *Griffith v. State*, 90 Ala. 583, 8 So. Rep. 812.

⁴ *Wilkins v. Ferrell* (Tex. Civ. App.), 30 S. W. Rep. 450.

⁵ *State v. Oliver*, 39 La. Ann. 470, 2 So. Rep. 194; *State v. Riley*, 42 La. Ann. 995, 8 So. Rep. 469; *Senn v. So. Pac. R. Co.*, 108 Mo. 142, 18 S. W. Rep. 1007. The exclamations of by-standers that defendant ought to be hung are not *res gestæ*. *Kaelin v. Com.*, 84 Ky. 354, 1 S. W. Rep. 594. Where a boy was run over by a street-car, and it was charged that the conductor had kicked him off, it was held that it could not be shown that, at the moment the boy fell, a lady on the sidewalk shouted, "Murder!" *Leahey v. Cass Ave., etc.*, R. Co., 97 Mo. 165, 10 S. W. Rep. 58, 10 Am. St. Rep. 300. In *Kirkpatrick v. Briggs*, 78 Hun 518, 29 N. Y. Supp. 532, a case where the

plaintiff sued for injuries received by falling through a trap-door in the sidewalk, the court held that it was not competent to prove that at the time of the accident a person passing said to the employe, whose act in leaving the trap-door open was complained of as causing the accident: "That is a very careless way to leave that, young fellow." In *Bradshaw v. Com.*, 10 Bush (Ky.) 576, the prosecution claimed that the defendant had shot deceased while on the platform of a moving railway coach and had thrown his body therefrom. The cause was reversed because the trial court permitted witnesses to testify to the following exclamations made by persons standing on the platform and in the immediate presence of the actors: "Bradshaw has shot him!" "Bradshaw has pushed him off!" "Bradshaw has killed him!" It can not be shown that a by-stander pointed out a person other than the defendant as the person who did the shooting. *Felder v. State*, 23 Tex. App. 477, 5 S. W. Rep. 145, 59 Am. Rep. 777; *Davis v. State* (Tex. Cr. App.), 23 S. W. Rep. 796.

act is of such an absorbing character as to draw every spectator within the maelstrom of the event, the instinctive contemporaneous utterances of the eye-witnesses ought to be competent.¹ It sometimes happens that the event makes a by-stander an actor.² Instances are not infrequent where a by-stander makes a declaration which puts him in the line of causation with the principal event. His declaration in such a case would be competent. Thus, where a defendant was charged with an assault and battery with intent to kill, and his claim was that he had done the act in self-defense, it was held proper for him to prove that just before, persons in the crowd yelled: "Kill him! Kill him! Don't let that nigger get back to the bottom!"³ Where the plaintiff was injured in jumping from a street-car to avoid, as she thought, the danger of being run over by a locomotive, and the question was whether from her standpoint she was justified in adopting the dangerous alternative of jumping off, it was held competent to show the cries of other passengers, such as, "Look out!" "Drive on quick!" "Stop! locomotive is coming!" These exclamations tended to illustrate the confusion, excitement and terror of the passengers.⁴ In another case it was held that the declarations of per-

¹ See Whart. on Ev., § 260.

² In a prosecution for murder it was held competent to prove that a third person, who was present at the killing, said: "Hurry up. They have about killed this man," as the declaration amounted to an effort to aid the stricken person, and made the by-stander an actor. *State v. Kaiser*, 124 Mo. 651, 28 S. W. Rep. 182.

³ *Morton v. State*, 91 Tenn. 437, 19 S. W. Rep. 225. See *Baker v. Gausin*, 76 Ind. 317.

⁴ *Kleiber v. People's R. Co.*, 107 Mo. 240, 17 S. W. Rep. 946; *St. Louis, etc., R. Co. v. Murray*, 55 Ark. 248, 18 S. W. Rep. 50, 29 Am. St. Rep. 32; *Galena, etc., R. Co. v. Fay*, 16 Ill. 558,

63 Am. Dec. 323. In *Mitchell v. South Pac. R. Co.*, 87 Cal. 62, 25 Pac. Rep. 245, the plaintiff was injured by the derailment of a car. He was on the platform at the time, and in order to excuse his presence there, he testified that he went out on the platform as a place of greater safety, as the train was running very fast around a curve and over an imperfect roadbed. It was held proper for the defendant to show that the other passengers kept their seats. The court said: "They all had an equal interest in protecting themselves, and will be presumed to have done what appeared to involve the least hazard."

sons attending upon a sale were competent, as tending to show that the plaintiff's professions had affected the bidding.¹

§ 291. **Matter of opinion.**—The *res gestæ* may consist of matter of opinion. Such declarations are usually objectionable, because the idea of an opinion upon an event would ordinarily suggest that the mind of the declarant had come out from under the domination of the event and was sitting in judgment upon it. Still, illustrations may be conceived where although the declaration is, or takes the form of, an opinion, yet the event is still speaking through the declarant. In one case the defendant street-car company was charged with negligence because of the conductor giving a signal to start too soon, and thus causing plaintiff's injury. The injury rendered the latter unconscious for a moment; upon recovering consciousness, the conductor said to her: "I am very sorry, madam; that was my fault." The court excluded the declaration on the ground that it was "in form and substance narrative, and expressed an opinion upon a past transaction."² On the other hand, where the decedent was scalded under an engine, and exclaimed, after being assisted to a chair twenty-five or thirty steps away, and while laboring under great pain and excitement: "I am a dead man, but nobody is to blame but myself. I turned the plug the wrong way and it came out," the declarations were held competent.³

§ 292. **Principal fact must be established by direct proof.**—In the preceding pages of this chapter we have been at some pains to show that the *res gestæ* does not rest upon the low plane of hearsay evidence, because of its connection with, and consequent credit from, the principal fact. Reasoning from this postulate, it would seem to be an incontrovertible proposition that the fact under inquiry must always be established by direct proof,⁴ except possibly in that class of subjective in-

¹ *Walter v. Gernant*, 13 Pa. St. 515, Ind. App. 427, 28 N. E. Rep. 714, 9 53 Am. Dec. 491. Ind. App. 63, 35 N. E. Rep. 565.

² *Williamson v. Cambridge R. Co.*, ⁴ *White v. Rayburn*, 11 Ore. 450, 5 144 Mass. 148, 10 N. E. Rep. 790. Pac. Rep. 345.

³ *Louisville, etc., R. Co. v. Berry*, 2

quiries where the ascertainment of mental condition is the end sought.¹

§ 293. *Res gestæ* is primary.—The theory upon which *res gestæ* evidence of declarations is admitted is that such declarations are connected with and a part of the principal act. For this reason they are primary evidence, and may be introduced without calling as a witness the person from whose lips the statement fell.² It is obvious that if the law infallibly required that the facts should be ascertained from witnesses upon the trial, the courts would be deprived of the opportunity to see transactions in the vivid light of real life, and would be com-

¹ This view finds illustration in § 586 of Taylor on Evidence. The learned author says: "Declarations, though admissible as evidence of the declarant's knowledge or belief of the facts to which they relate, and of his intentions respecting them, are no proof of the facts themselves; and therefore, if it be necessary to show the existence of such facts, proof *altunde* must be laid before the jury; and it seems that, in strict practice, this proof should be given in the first instance, before the court be called upon to receive evidence of the declarations. For example, the fact of insolvency must be established, before statements of the insolvent will be admitted to show that he was aware of his embarrassed circumstances. Sometimes, under the law relating to bankrupts, the truth of the facts need not be proved, but it will not suffice to show the bankrupt's belief. Thus, if the act of bankruptcy relied upon be an absenting with intent to delay creditors, a declaration by the bankrupt that he left home to avoid a writ will be admissible, though no evidence be given that any writ was actually out against him, because, in order to constitute this act of bankrupt-

cy, neither writ nor pressure is necessary. Still, even in this case, the departure from home is a substantive act, which must be proved by evidence independent of the declaration; and being in itself an act equivocal, the statement of the bankrupt, made during its continuance, is admissible to show the intention with which it was done."

² *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268. This doctrine is so elementary that there is a paucity of authority upon it. In § 267 of Wharton on Evidence it is said: "Nor, ordinarily, is it admissible to prove the narration of a witness as part of the *res gestæ*, if the witness himself is obtainable on trial." It is a matter of surprise that so inaccurate a statement should slip from the pen of a writer whose works on legal subjects are so justly esteemed. Narrative is never admissible as *res gestæ*, and under no circumstances are *res gestæ* declarations other than primary evidence. In § 175 of the work mentioned, Mr. Wharton contradicts the above statement by excepting *res gestæ* statements from the ordinary rule that the extra-judicial statements of third persons can not be proved.

pelled to seek the truth in many instances from untruthful or unwilling witnesses, instead of through the natural emanations of their minds when the event under inquiry had absorbed all calculating policy. Within the principle of the doctrine stated in this section is the proposition that it is not a material fact, so far as the competency of the evidence is concerned, that the declarant happens to be an incompetent witness.¹

§ 294. **Duty of state to prove the whole of *res gestæ*.**—In criminal cases the expectation is that the state will produce and use all witnesses in reach of its process, of whatever character, whose testimony will throw light upon and characterize the transaction under inquiry, whether it tends to convict or acquit the defendant. The English cases lay down the doctrine that the government must produce every witness,² and this seems to be the rule in Michigan,³ and some countenance is given to the doctrine in other states.⁴ But it is to be recollected that this ruling had its origin under a system of practice which denied to the defendant the right to counsel. There is now no occasion to press the doctrine to its extreme length, and the better opinion is that when the prosecution has developed the whole *res gestæ*, and introduced a number of witnesses, it ought not to be compelled to call a hostile witness, or one of such disreputable character that he could be impeached.⁵

¹ *Cook v. State*, 22 Tex. App. 511, 3 S. W. Rep. 749; *Johnson v. Sherwin*, 3 Gray 374; *Walton v. Green*, 1 Car. & P. 621; *Gilchrist v. Bale*, 8 Watts 355, 34 Am. Dec. 469; *Aveson v. Kinnair*, 6 East 188; *Thompson v. Trevanion*, 1 Skin. 402.

² *Reg. v. Holden*, 8 Car. & P. 606; *Reg. v. Chapman*, 8 Car. & P. 559; *Reg. v. Bull*, 9 Car. & P. 22.

³ *Maher v. People*, 10 Mich. 212, 225, 81 Am. Dec. 781; *People v. Deitz*, 86 Mich. 419, 49 N. W. Rep. 296.

⁴ *Thompson v. State*, 30 Tex. App. 23—Ev.

325, 17 S. W. Rep. 448; *Ter. v. Hanna*, 5 Mont. 248, 5 Pac. Rep. 252.

⁵ *State v. Roberts*, 63 Vt. 139, 21 Atl. Rep. 424; *Com. v. Haskell*, 140 Mass. 128, 2 N. E. Rep. 773; *State v. Martin*, 2 Ired. L. 101; *State v. Cain*, 20 W. Va. 679; *State v. Smallwood*, 75 N. Car. 104; *State v. Eaton*, 75 Mo. 586; *State v. Middleham*, 62 Iowa 150, 17 N. W. Rep. 446; *State v. McGahey*, 3 N. D. 293, 55 N. W. Rep. 753. Some of the authorities cited in this note repudiate the English doctrine entirely.

§ 295. **Certain *res gestæ* topics treated elsewhere.**—The subjects of declarations of agents, declarations of partners, declarations of principals against sureties and declarations of co-conspirators might all be properly treated under the head of *res gestæ*, but since it has been the policy in the preparation of this work not to split topics, it is deemed that those mentioned can be best treated under the head of admissions.

CHAPTER X.

RUMOR AND GENERAL REPUTATION.

§ 296. Rumor and common report.
297. Character.

§ 298. Same subject continued.
299. Practice in proving character.

§ 296. **Rumor and common report.**—Evidence of rumor, or of common report, of a matter not of public interest is not evidence of a substantive or objective fact.¹ Thus, such evidence is rejected in proof of facts like residence,² or partnership,³ or as to whether a person was careful or negligent on a particular occasion.⁴ The rule may sometimes yield to convenience,

¹Hinds v. Keith, 57 Fed. Rep. 10; Collins v. Jones, 83 Ala. 365, 3 So. Rep. 591; Abel v. State, 90 Ala. 631, 8 So. Rep. 760; Walker v. State, 102 Ind. 502, 1 N. E. Rep. 856, and cases cited; 1 Greenl. on Ev., § 138. A mere rumor that a person is living or dead, not shown to have been known to, or accepted by, the family, is not competent. Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. Rep. 281; Johnson v. Johnson, 114 Ill. 611, 3 N. E. Rep. 232, 55 Am. Rep. 883. General reputation as to particular facts is inadmissible except where the existence of the facts have been proved *altunde*, and the evidence of reputation is offered to qualify or explain the facts. Shutte v. Thompson, 15 Wall. 151; 1 Greenl. on Ev., § 138.

²Ferguson v. Wright, 113 N. Car. 537, 18 S. E. Rep. 691; Pfister v. Dascey, 68 Cal. 572, 10 Pac. Rep. 117.

³Adams v. Morrison, 113 N. Y. 152, 20 N. E. Rep. 829; Smith v. Griffith, 3 Hill 333, 38 Am. Dec. 639; Halliday v.

McDougall, 20 Wend. 81; Grafton Bank v. Moore, 13 N. H. 99, 38 Am. Dec. 478; Brown v. Crandall, 11 Conn. 93; Wallis v. Wood (Tex.), 7 S. W. Rep. 852. See Metcalf v. Officer, 2 Fed. Rep. 640, where question was as to a dormant partner.

⁴Baltimore, etc., R. Co. v. Colvin, 118 Pa. St. 230, 12 Atl. Rep. 337; Boick v. Bissell, 80 Mich. 260, 45 N. W. Rep. 55; McDonald v. Inhabitants of Savoy, 110 Mass. 49; Morris v. Town of East Haven, 41 Conn. 252; Scott v. Hale, 16 Me. 326; Chase v. Maine, etc., R. Co., 77 Me. 62, 52 Am. Rep. 744; Chicago, etc., R. Co. v. Clark, 108 Ill. 113; Adams v. Chicago, etc., R. Co., 93 Iowa —, 61 N. W. Rep. 1059. But there are cases which admit this kind of evidence where there was no witness to the facts. Chicago, etc., R. Co. v. Clark, 108 Ill. 113; Cassidy v. Angell, 12 R. I. 447; Cohen v. Stein, 61 Wis. 508, 21 N. W. Rep. 514. See *ante*, § 68.

where the true facts can be readily shown, if not in accord with the common repute. For instance, official character may be shown, by proving that a person is generally reputed to have acted as such officer, without producing his commission.¹ Where it is an ultimate fact to be proved that a person had knowledge of a certain fact, then evidence that it was a matter of general reputation is competent, as tending to trace notice home to the party to be charged,² provided that the person sought to be affected by notice was so situated as to render it probable that he was apprised of what was generally known.³ In a prosecution for keeping a house of ill fame, evidence of general reputation as to the character of the house is competent, on the theory that it is a substantive offense to keep a house that bears that kind of a reputation,⁴ but it has been

¹ *McCoy v. Curtice*, 9 Wend. 17, 24 Am. Dec. 113. In *Hart v. New Orleans, etc.*, R. Co., 1 Rob. (La.) 178, 36 Am. Dec. 689, which was a suit for an injury sustained by being run over by an omnibus, it was held that general reputation of the defendant's ownership of the omnibus was competent, as defendant could readily have shown the contrary, if that was in accord with the fact. In *Staser v. Hogan*, 120 Ind. 207, 21 N. E. Rep. 911, it was held incompetent to show by a witness that he had never heard any one question the sanity of the person whose sanity was in issue, while such person was yet in life. In *Hackett v. Amsden*, 59 Vt. 553, 8 Atl. Rep. 737, it was held that it was not admissible to prove, on an issue as to whether a man or his wife owned certain personal property, that the witness had lived near them, and had never heard that the property was claimed to be the wife's.

² *Wormsdorf v. Detroit City Ry. Co.*, 75 Mich. 472, 42 N. W. Rep. 1000, 13 Am. St. Rep. 453; *Hilts v. Chicago, etc.*, R. Co., 55 Mich. 437, 21 N. W. Rep. 878; *Monahan v. City of Worces-*

ter, 150 Mass. 439, 23 N. E. Rep. 228, 15 Am. St. Rep. 226; *Gordon v. Ritenour*, 87 Mo. 54; *Ferbrache v. Martin* (Idaho), 32 Pac. Rep. 252; *Louisville, etc.*, R. Co. v. *Hall*, 87 Ala. 708, 6 So. Rep. 277, 13 Am. St. Rep. 84; *Norfolk, etc.*, R. Co. v. *Hoover*, 79 Md. 253, 29 Atl. Rep. 994, 47 Am. St. Rep. 392; *Conover v. Berdine*, 69 Mo. 125, 33 Am. Rep. 496. See *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. Rep. 1003. See *Hedges v. Wallace*, 2 Bush 442, 92 Am. Dec. 497. As to general reputation of a dissolution of partnership, see *Lovejoy v. Spafford*, 93 U. S. 430. *Contra*, *Central Nat. Bank v. Frye*, 148 Mass. 498, 20 N. E. Rep. 325.

³ *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140, 1 So. Rep. 773. See as to declarations to prove notoriety, *Hinckley v. Inhabitants of Somerset*, 145 Mass. 326, 14 N. E. Rep. 166; *Chase v. City of Lowell*, 151 Mass. 422, 24 N. E. Rep. 212.

⁴ *State v. West*, 46 La. Ann. 1009, 15 So. Rep. 418; *Stone v. State*, 22 Tex. App. 185, 2 S. W. Rep. 585; *Ter. v. Chartrand*, 1 Dak. 379; *Ter. v. Stone*, 2 Dak. 155, 4 N. W. Rep. 697; *State*

held, where the character of a house, as a house of ill fame, arose in a collateral proceeding, that the general reputation of the house could not be proved.¹ A seeming exception to the general rule declared in the first part of this section exists in the case of marriage. General reputation of the existence of the relation is received, when coupled with evidence of cohabitation.² The reason for this, although not clearly expressed in the books, is, no doubt, the consideration that as marriage is a relation to society, it is therefore competent to inquire how society received a man and woman who were cohabiting as man and wife. In such a case the cohabitation would be the principal fact and the reputation but a concomitant fact. However, at the best, this class of evidence is of but a suppletory character. It is competent where title is sought to be established by the statute of limitations to show the claims of ownership made by the party in possession, as such evidence bears upon the question as to the character of his holding,³ but the question of ownership, as a substantive fact, can not be tried by evidence of reputation.⁴

§ 297. **Character.**—"Character," said Lord Erskine,⁵ "is the slow spreading influence of opinion arising from the deportment of a man in society; as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion. That general opinion is allowed to be given in evidence." In a New York decision,⁶ it was held that in a civil case, where the

v. Hendricks, 15 Mont. 194, 39 Pac. Rep. 93, 48 Am. St. Rep. 666; *Simmermain v. State*, 14 Neb. 538, 17 N. W. Rep. 115. Mich. 63, 6 N. W. Rep. 93; *Sanscrainte v. Torongo*, 87 Mich. 69, 49 N. W. Rep. 497.

¹ *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177.

² *Northrop v. Knowles*, 52 Conn. 522, 52 Am. Rep. 613; *Marble v. Marble*, 36 Mich. 386; *Clement v. Kimball*, 98 Mass. 535; *United States v. Tenney* (Ariz.), 8 Pac. Rep. 295.

³ *Ante*, § 289; *Sparrow v. Hovey*, 44

⁴ *Canfield v. Hard*, 58 Vt. 217, 2 Atl. Rep. 136; *Hackett v. Amsden*, 59 Vt. 553, 8 Atl. Rep. 737; *Reiley v. Haynes*, 38 Kan. 259, 16 Pac. Rep. 440, 5 Am. St. Rep. 737; *Berniaud v. Beecher*, 76 Cal. 394, 18 Pac. Rep. 598. See, *ante*, § 296, n.

⁵ *R. v. Hardy*, 24 St. Tr. 199, 1079.

⁶ *Ruan v. Perry*, 3 Cal. 120.

charge was fraud, and it was sought to be proved by circumstantial evidence, that the party against whom the charge was made might offer evidence of his good character. This case has not only been overruled in the state of its origin,¹ but it has been sharply criticised elsewhere.² There are a number of states in which it is held that evidence of character is admissible in civil cases to rebut a direct imputation of crime which gives rise to the action,³ but in most jurisdictions it is held that to admit evidence of character it must be directly drawn in issue, as in libel, slander or seduction.⁴ It is held in Wis-

¹ *Gough v. St. John*, 16 Wend. 646. See *Simpson v. Westenberg*, 28 Kan. 576, 42 Am. Rep. 195.

² *Simpson v. Westenberg*, 28 Kan. 576; *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341; *Barton v. Thompson*, 56 Iowa 571, 41 Am. Rep. 119; *Leinkauf v. Brinker*, 62 Miss. 255, 52 Am. Rep. 183. See *Lamagdelaine v. Tremblay*, 162 Mass. 339, 39 N. E. Rep. 38.

³ *Warner v. Com.*, 42 Va. Cas. 95. See *Houghtaling v. Kilderhouse*, 1 N. Y. 530, 2 Barb. 149, and cases cited; *Howland v. George F. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. Rep. 656.

⁴ *American Fire Ins. Co. v. Hazen*, 110 Pa. St. 530, 1 Atl. Rep. 605; *Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341; *Zitzer v. Merkel*, 24 Pa. St. 408; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. Rep. 636, 59 Am. Rep. 194; *Gebhart v. Burkett*, 57 Ind. 378; 28 Am. Rep. 61; *Humphrey v. Humphrey*, 7 Conn. 116; *Mead v. Husted*, 52 Conn. 53, 52 Am. Rep. 554; *Gutzwiller v. Lackman*, 23 Mo. 168; *Norris v. Stewart's Heirs*, 105 N. Car. 455, 10 S. E. Rep. 912, 18 Am. St. Rep. 917; *Barton v. Thompson*, 56 Iowa 571, 9 N. W. Rep. 899, 41 Am. Rep. 119; *Stoppert v. Nierle*, 45 Neb. 105, 63 Neb. 382; *Sidelinger v. Bucklin*, 64 Me. 371. In *Wright v. McKee*, 37 Vt. 161, it is said: "Many considerations concur

in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed, and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced. It may then, perhaps, serve to turn the wavering scales. Very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature, both because the true character of a large portion of mankind is ascertained with difficulty, and because those who are called to testify are reluctant to disparage their neighbors, especially if they are wealthy, influential, popular, or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partisanship, or other bias of which they are unconscious, and in cases which are not quite clear, they are apt to agree with the one who first speaks to them on the subject, or to form their opinions from the opinions of others. The introduction of such evidence in civil cases, whenever character is assailed, would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that might easily be manu-

consin,¹ Virginia² and Indiana,³ and Massachusetts,⁴ that the plaintiff may give evidence of his good character, where otherwise warranted, as a part of his opening proofs, but there is authority the other way.⁵ If the evidence as to the defendant's opportunity to be apprised of the plaintiff's good reputation is such as to justify a presumption that he did know of it in point of fact, there would seem to be a warrant for the introduction of such evidence upon the plaintiff's case in chief, in order to make out the element of malice, and also, as hereafter stated, of want of probable cause in malicious prosecution cases. In a breach of promise case, where the cross-examination of the plaintiff tended to show that illicit relations had existed between her and the defendant, it was held proper for her to introduce evidence as to her general reputation for chastity, virtue and morality.⁶ Evidence of character has been held competent in suits for malicious prosecution where the prosecution complained of was for an offense implying moral turpitude, either on behalf of the defendant to strengthen his evidence of probable cause, or on behalf of the plaintiff to overthrow such claim of defense.⁷ In actions for defamation and seduction, the authorities are almost entirely agreed that evidence of the plaintiff's bad character is admissible in mitigation of damages.⁸

factured, is liable to abuse, and if in common use in the courts, as likely to mislead as to guide aright."

¹ Woodworth v. Mills, 61 Wis. 44, 20 N. W. Rep. 728, 50 Am. Rep. 135.

² Adams v. Lawson, 17 Grat. 250, 94 Am. Dec. 455.

³ Blizzard v. Hays, 46 Ind. 166, 15 Am. Rep. 291.

⁴ McIntire v. Levering, 148 Mass. 546, 20 N. E. Rep. 191, 12 Am. St. Rep. 594.

⁵ Hitchcock v. Moore, 70 Mich. 112, 37 N. W. Rep. 914, 14 Am. St. Rep. 474 and cases there cited; Diers v. Mallon, 46 Neb. 121, 64 N. W. Rep. 722, 50 Am. St. Rep. 598; Blakeslee

v. Hughes, 50 Ohio St. 490, 34 N. E. Rep. 793; Cochran v. Toher, 14 Minn. 385; Fire Association v. Fleming, 78 Ga. 733, 3 S. E. Rep. 420.

⁶ Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. Rep. 745.

⁷ McIntire v. Levering, 148 Mass. 546, 20 N. E. Rep. 191, 12 Am. St. Rep. 594, and cases there cited; Blizzard v. Hays, 46 Ind. 166, 15 Am. Rep. 291; Israel v. Brooks, 23 Ill. 526; Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693.

⁸ Bodwell v. Swan, 3 Pick. 377; Stone v. Varney, 7 Metc. 86; 39 Am. Dec. 762; Clark v. Brown, 116 Mass. 504; Paddock v. Salisbury, 2 Cow. 811;

§ 298. *Same subject continued.*—In prosecutions for rape, where it is claimed that the woman consented, evidence may be introduced as to her general reputation as a prostitute at the time of the alleged rape, in order to render it more probable that she consented, but she can not be expected to meet specific charges as to her relations with other men.¹ But previous acts of incontinence with the defendant, or of lewd and indecent behavior toward him, are within the *res gestæ* of the inquiry.² There seems to be some disagreement among the authorities as to the right to interrogate the female, on cross-examination, as to her prior acts of sexual intercourse with other men where no question of paternity is involved,³ but the right to this evidence is clear in statutory suits by females for their own seduction, where the statute contemplates that the aggrieved party shall have possessed actual personal chastity.⁴ It has been held that the defendant who by his act has caused the plaintiff to have a bad reputation can not introduce evidence of her subsequent bad reputation.⁵ But it would seem to be impracticable to apply this doctrine in jurisdictions where the practice permits an impeachment of witnesses on the ground that they are persons of general bad moral character, if the female testifies as a witness. In actions where a man is charged with adultery, the bad reputation of the woman for chastity may be shown, as substantive evidence tending to increase the probability of illicit intercourse.⁶ In criminal cases the defendant is entitled to put in evidence his good general reputation for the particular trait involved at the time the evidence tends to

Bowen v. Hall, 20 Vt. 232; Lowe v. Ind. 467, 4 N. E. Rep. 63. See State Herald Co., 6 Utah 175, 21 Pac. Rep. v. Reed, 39 Vt. 417.

991; Lamos v. Snell, 6 N. H. 413, 25 Am. Dec. 468.

¹ *Ante*, § 58; Rice v. State, 35 Fla. 236, 17 So. Rep. 286, 48 Am. St. Rep. 245.

² State v. Ward, 73 Iowa 532, 35 N. W. Rep. 617; Strang v. People, 24 Mich. 1; McDermott v. State, 13 Ohio St. 332, 82 Am. Dec. 444; State v. Campbell, 20 Nev. 122, 17 Pac. Rep. 620; Pefferling v. State, 40 Tex. 486; Rice v. State, 35 Fla. 236, 17 So. Rep. 286, 48 Am. St. Rep. 245, and cases there cited; Anderson v. State, 104

³ 2 Greenl. on Ev., § 577; Whart. on Ev., § 51. See *ante*, § 91.

⁴ Lyons v. State, 52 Ind. 426; State v. Painter, 50 Iowa 317.

⁵ Shewalter v. Bergman, 123 Ind. 155, 23 N. E. Rep. 686.

⁶ Com. v. Gray, 129 Mass. 474, 37 Am. Rep. 378.

show the offense was committed.¹ Evidence of good character is now recognized as competent in criminal cases irrespective of the question as to whether the offense charged is great or small,² and it is no longer the rule of law that such evidence is competent only in doubtful cases. Where good character is a fact in a case, it should be weighed in connection with the other evidence, and it may alone suffice to create a reasonable doubt in the minds of the jury.³ In a homicide case, where the question is as to whether the defendant was exercising the right of self-defense, evidence is competent of the violent and quarrelsome disposition of the deceased,⁴ but the state can not offer evidence of the good character of the deceased in the first instance.⁵ The defendant can not raise an issue as to the char-

¹ *State v. Emery*, 59 Vt. 84, 7 Atl. Rep. 129; *Com. v. Nagle*, 157 Mass. 554, 32 N. E. Rep. 861; *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. Rep. 460; *Walker v. State*, 102 Ind. 502, 1 N. E. Rep. 856; *Chung Sing v. United States*, (Ariz.) 36 Pac. Rep. 205. Where the charge is murder, committed by poison, the defendant may give in evidence his general good reputation for peace and quietude. *Hall v. State*, 132 Ind. 317, 31 N. E. Rep. 536; *Carr v. State*, 135 Ind. 1, 34 N. E. Rep. 533, 41 Am. St. Rep. 408. According to the weight of authority, if a defendant offers evidence of his good character, his witnesses on that question may be cross-examined as to their hearing of specific matters affecting the defendant's reputation as to the particular trait involved. *State v. Jerome*, 33 Conn. 265; *Goodwin v. State*, 102 Ala. 87, 15 So. Rep. 571; 1 Taylor on Ev., § 352. See *Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325; *People v. White*, 14 Wend. 111; *Knight v. State*, 70 Ind. 375; *State v. Hull*, 18 R. I. 207, 26 Atl. Rep. 191.

² *Cancemi v. People*, 16 N. Y. 501; *Com. v. Leonard*, 140 Mass. 473, 4 N. E. Rep. 96, 54 Am. Rep. 485, disap-

proving *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711. In *Com. v. Nagle*, 157 Mass. 554, 32 N. E. Rep. 861, a doubt was intimated as to the competency of evidence of character in cases where the acts charged have no moral quality, but are merely *mala prohibita*.

³ *Com. v. Leonard*, 140 Mass. 473, 4 N. E. Rep. 96, 54 Am. Rep. 485; *People v. Hancock*, 7 Utah 170, 25 Pac. Rep. 1093; *Murphy v. State*, 108 Ala. 10, 18 So. Rep. 557; *Heine v. Com.*, 91 Pa. St. 145; *Hanney v. Com.*, 116 Pa. St. 322, 9 Atl. Rep. 339; *Stewart v. State*, 22 Ohio St. 477; *State v. Lindley*, 51 Iowa 343, 353, 1 N. W. Rep. 484, 33 Am. Rep. 139; *State v. Daley*, 53 Vt. 442, 38 Am. Rep. 694; *Remsen v. People*, 43 N. Y. 6; *Coleman v. State*, 59 Miss. 484; *Harrington v. State*, 19 Ohio St. 264; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *People v. Lee*, (Cal.) 8 Pac. Rep. 685. See *State v. Slingerland*, 19 Nev. 135, 7 Pac. Rep. 280.

⁴ *Keep v. Quallman*, 68 Wis. 451, 32 N. W. Rep. 233; *People v. Druse*, 103 N. Y. 655, 8 N. E. Rep. 733.

⁵ *State v. Potter*, 13 Kan. 414; *Ben v. State*, 37 Ala. 103; *State v. Eddon*, 82 Wash. 292, 36 Pac. Rep. 139; *Pound*

acter of the deceased, in the absence of some hostile demonstration on the part of the latter.¹ In actions for defamation of character, while the defendant may not show in evidence that a gossip already existed concerning the matter of his defamatory statement, yet, according to the better considered authorities, he may show in mitigation the existence of a general rumor in the neighborhood to the same effect as his statement.²

§ 299. **Practice in proving character.**—If a witness testifies that he is acquainted with the person whose reputation is in question, and that he is generally acquainted in the vicinity of such person's residence, he may express an opinion as to such person's general reputation, although he has not answered categorically that he is acquainted therewith.³ In fact some of the authorities permit the witness to go the length of expressing an opinion directly upon the question of character.⁴

v. State, 43 Ga. 88; *Dock v. Com.*, 21 Gratt. 909; *People v. Anderson*, 39 Cal. 703; *State v. McCarthy*, 43 La. Ann. 541, 9 So. Rep. 493. As to the competency of evidence of particular acts of the deceased coming to the knowledge of the defendant, see *People v. Harris*, 95 Mich. 87, 54 N. W. Rep. 648; *Bowlus v. State*, 130 Ind. 227, 28 N. E. Rep. 1115. In the case last cited it is held that the introduction of evidence of particular traits of the deceased's character constituting him a dangerous antagonist is admissible, if known to the defendant, and that the introduction of this class of evidence will authorize the state to seek to rebut it by evidence of the general character of the deceased for peace and quietude.

¹ *Bowlus v. State*, 130 Ind. 227, 28 N. E. Rep. 1115; *Rauck v. State*, 110 Ind. 384, 11 N. E. Rep. 450; *State v. Mitchell*, 41 La. Ann. 1073, 6 So. Rep. 785. Nor is such evidence competent where

the defendant denies the killing. *Manning v. State*, 79 Wis. 178, 48 N. W. Rep. 209; *People v. Lamb*, 2 Keyes (N.Y.) 360; *Pfomer v. People*, 4 Park Cr. R. 558.

² *Case v. Marks*, 20 Conn. 248; *Wetherbee v. Marsh*, 20 N. H. 561; *Galloway v. Courtney*, 10 Rich. (So. Car.) 414; *Calloway v. Middleton*, 2 A. K. Marsh. 372, 12 Am. Dec. 409; *Sanders v. Johnson*, 6 Blackf. 50, 36 Am. Dec. 564; *Fuller v. Dean*, 31 Ala. 654. *Contra*, *Wolcott v. Hall*, 6 Mass. 514, 4 Am. Dec. 173; *Matson v. Buck*, 5 Cow. 499; *Mapes v. Weeks*, 4 Wend. 659; *Pease v. Shippen*, 80 Pa. St. 513, 21 Am. Rep. 116; *Sheahan v. Collins*, 20 Ill. 325; *Anthony v. Stephens*, 1 Mo. 254, 13 Am. Dec. 497.

³ *State v. Deitrick*, 51 Iowa 467, 1 N. W. Rep. 732.

⁴ *Dufreshne v. Weise*, 46 Wis. 290, 1 N. W. Rep. 59; *Senter v. Carr*, 15 N. H. 351; *Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616.

It is a well established doctrine that a witness qualified as above stated may testify that he never heard the person's reputation discussed, as tending to show that it is good.¹ The subject of this section is discussed somewhat further in another connection.²

¹ *State v. Lee*, 22 Minn. 407, 21 Am. State v. Nelson, 58 Iowa 208, 12 N. W. Rep. 769; *Gandolfo v. State*, 11 Ohio Rep. 253; *Cole v. State*, 59 Ark. 50, 26 St. 114; *Davis v. Foster*, 68 Ind. 238; S. W. Rep. 377; *Reg. v. Rowton*, 10 Davis v. Franke, 33 Grat. 413; *Hussey Cox Cr. Cases*, 25. v. State, 87 Ala. 121, 6 So. Rep. 420; ² *Ante*, §§ 95, 96.

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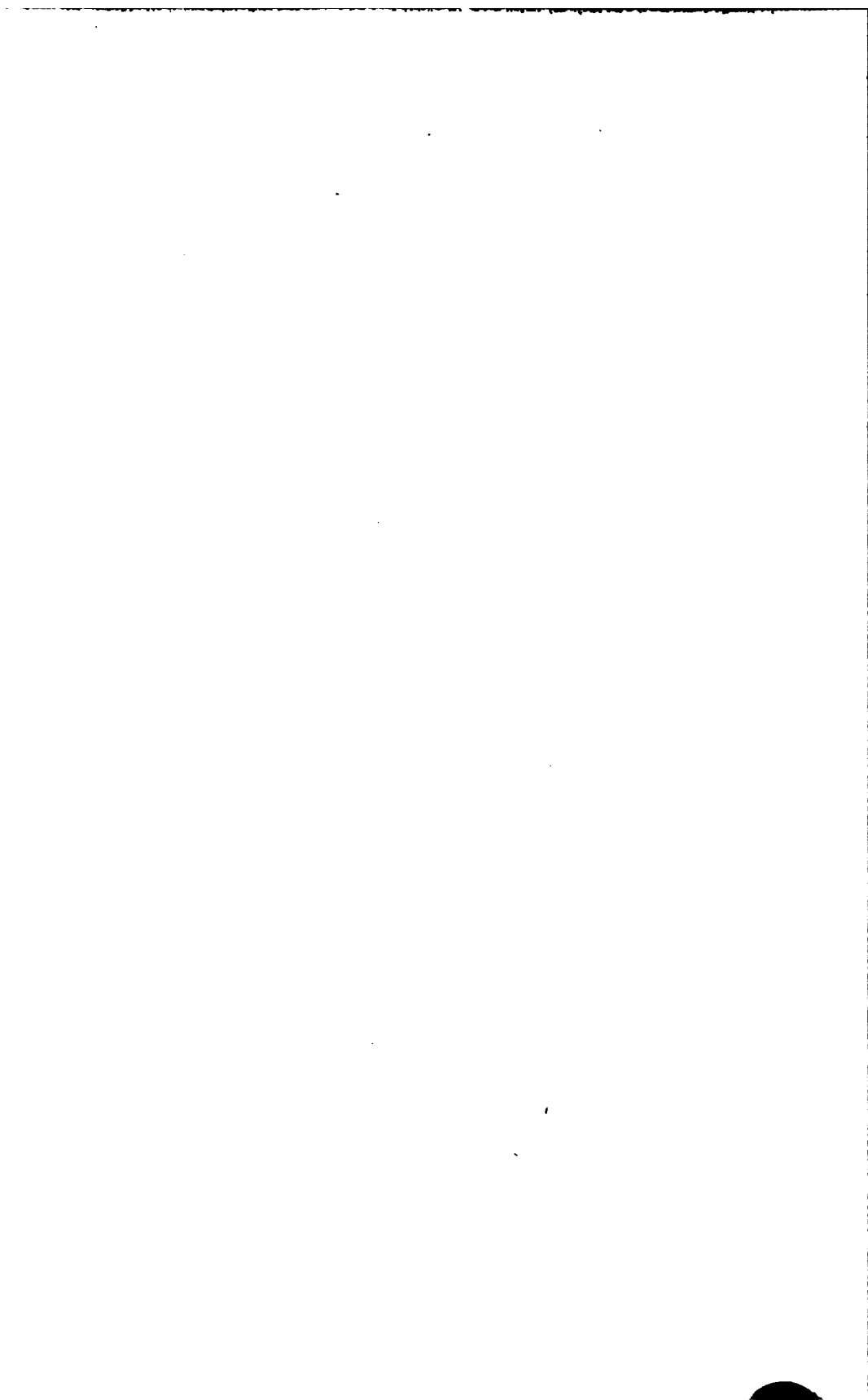
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